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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY "MIKE" GARRISON,
Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW[1]

In this case, the Supreme Court of Illinois held the Illinois Public Indecency Statute[2] constitutional and not violative of the due process doctrine of vagueness nor the equal protection clause of the Fourteenth Amendment, nor violative of First Amendment Rights or Privacy Rights, and denied that appellant had standing to raise the statute's potential invasion of these rights under the overbreadth doctrine, although appellant was charged with lewd exposure of his body while in his own home. The questions presented are:

WHETHER THE PUBLIC INDECENCY STATUTE OF ILLINOIS IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT AND THE FIRST, THIRD, FOURTH, FIFTH, AND NINTH AMENDMENTS TO THE UNITED STATES CONSITUTION, FOR THE FOLLOWING REASONS:

1. The statutory term, "lewd exposure of the body done with intent to arouse or satisfy the sexual desire of the person...", meaning the actor, not the viewer, is vague and overbroad under the Fourteenth Amendment in that no *Miller* v. *California*[3] standard or other standard defines the work "lewd".

2. The Illinois Public Indecency Statute threatens the exercise of both First Amendment Rights and Privacy Rights in the home, thus necessitating the application of the overbreadth doctrine, which doctrine appellant has standing to invoke.

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[1] The parties to the proceedings in the Supreme Court of Illinois were: People of the State of Illinois, Appellant there and Appellee here; and Gary "Mike" Garrison, Appellee there and Appellant here.

[2] Chap. 38, pars. 11-9(a)(3), 11-9(b), Illinois Revised Statutes, 1977.

[3] *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607.

3. Inasmuch as *Miller* type standards define the word "obscene" in the Illinois Obscenity Statute[4], which criminalizes the performance of "an obscene exhibition of his body for gain", the appellant, when prosecuted for an alleged violation of the standardless Illinois Public Indecency Statute, is denied equal protection under the Fourteenth Amendment in that he is not accorded protection by standards defining the word "lewd", whereas a person prosecuted under the Illinois Obscenity Statute for performing the same act on a public stage for gain would be accorded standards defining the word "obscene".

4. Provisions of paragraph 11-9(b) of the statute, to-wit: " 'Public place'...means any place where the conduct may reasonably be *excepted* to be viewed by others." is unconstitutionally vague because the word "excepted" fails to warn that acts done in a private home may be punishable under the statute; and which word cannot properly be construed under the rule of strict construction of penal statutes to mean "expected" inasmuch as such construction threatens the exercise of privacy rights in the home by an ex post facto judicial enlargement of the statute.

5. Nowhere in the statute is there any requirement that the actor intend his conduct to be viewed by or arouse or affect any member of the public; thus, scienter is lacking, and the statute states no crime. This statutory deficiency may not be supplied by judicial construction or by allegations in the criminal charge against appellant.

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[4] Chap. 38, par. 11-20, Illinois Revised Statutes, 1977. See also Ward v. Illinois (1977), 431 U.S. 676, 97 S.Ct. 2085, 52 L.Ed.2d 738, 747, 748-751.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the Supreme Court of Illinois reversing the trial court's final dismissal Order, attached hereto as Appendix A, is reported at Sup. 45 Ill. Dec. 132, 412 N.E.2d 483, Sept. 29, 1980, Rehearing denied Nov. 26, 1980. The Order of the trial court, the Circuit Court of Marion County, Illinois, of October 17, 1979, appears as Appendix B hereto.

GROUNDS FOR JURISDICTION

The Supreme Court of Illinois, by its Opinion dated September 29, 1980, held the Illinois Public Indecency Statute constitutional (Appendix A) in reversing the Order of the Circuit Court of Marion County, Illinois (Appendix B), which dismissed two criminal cases brought against appellant charging three separate violations of the statute, which trial court dismissal was based on its holding that the Illinois Public Indecency Statute was unconstitutional. Appellant timely filed Petition for Rehearing on October 17, 1980 (Appendix E), which was denied by the Illinois Supreme Court on November 26, 1980 (Appendix F). Notice of Appeal to the United States Supreme Court was filed December 24, 1980, in the Office of the Clerk of the Supreme Court of Illinois (Appendix G).

This Court's jurisdiction is invoked under 28 U.S.C. 1257(2), and if that jurisdictional basis is found to be absent, then the jurisdictional basis is through a Petition for Certiorari under 28 U.S.C. 2103.

The cases sustaining jurisdiction are:

Cox Broadcasting Corp. v. *Kohn* (1975), 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029;

Mills v. *Alabama* (1966), 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434;

Radio Station WOW, Inc. v. *Johnson* (1945), 326 U.S. 120, 89 L.Ed. 2092, 65 S.Ct. 1475;

Mercantile National Bank v. *Langdeau* (1963), 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520.

CONSTITUTIONAL PROVISIONS INVOKED

Amendment I - Congress shall make no law...abridging the freedom of speech,...

Amendment III - No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV - The right of the people to be secure in their persons, houses...against unreasonable searches and seizures, shall not be violated,...

Amendment V - No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

Amendment IX - The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

Amendment XIV - Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT STATUTES

The Illinois Public Indecency Statute, being Chapter 38, Pars. 11-9(a)(3) and 11-9(b), Illinois revised Statutes, 1977, which provides as follows:

> "Sec. 11-9. Public Indecency. (a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> "(1) An act of sexual intercourse; or
>
> * * *

"(3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person;...

* * *

"(b) 'Public place' for purposes of this Section means any place where the conduct may reasonably be excepted to be viewed by others.

"(c) Sentence.

"Public indecency is a Class A misdeameanor.

The Illinois Obscenity Statute, being Chapter 38, par. 11-20, Illinois Revised Statutes, 1977, which provides as follows:

"Sec. 11-20. *Obscenity.* (a) Elements of the offense.

"A person commits obscenity when,...he:

* * *

"(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain;

* * *

"(b) Obscene Defined.

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matter...."

* * *

"(d) Sentence. Obscenity is a Class A misdemeanor...."

STATEMENT OF THE CASE

Prosecution against appellant Garrison was commenced in the Circuit Court of Marion County, Illinois, based on the Illinois Public Indecency Statute, Chapter 38, Illinois Revised Statutes, paragraph 11-9(a)(3). Appellant, by Motion, attacked the constitutionality of the statute, raising the same Federal questions now sought to be reviewed, and the legal sufficiency of each Count (Appendix H). The trial court originally denied the Motion attacking the constitutionality of the statute, but dismissed all Counts of the Information because of legal insufficiency and granted the State leave to amend (Appendix C).

On October 17, 1979, appellant filed Motions in the Circuit Court of Marion County, Illinois, against the Amended Informations that had been filed by the State, which Motions again attacked the constitutionality of the Statute and again raised the Federal questions sought to be determined herein (Appendix I). These Amended Informations consisted of charges of three separate alleged violations, two in the original case and one in a second case filed at the time of the amendment (Appendix D). Each Count in each case alleged an act of exposure of the sex organ by the defendant while in his home at 404 Melrose in the City of Centralia, Illinois.

The Circuit Court of Marion County, Illinois, on October 17, 1979, entered a final Order sustaining appellant's Motions to Dismiss, holding the statute unconstitutional as set forth in the Order (Appendix B).

The State appealed to the Supreme Court of Illinois. Appellant Garrison filed his Brief in support of the trial court's Order holding the statute unconstitutional and again raised the same Federal questions attacking the constitutionality of the statute that had been raised by him from the outset of the case. The Supreme Court of Illinois reversed the final judgment Order of the trial court by its Opinion of September 29, 1980, rejecting the postion of appellant and held the statute to be con-

stitutional (Appendix A). Appellant Garrison timely filed his Petition for Rehearing on October 17, 1980, again raising the same federal questions (Appendix E). The Petition for Rehearing was denied by the Supreme Court of Illinois on November 26, 1980 (Appendix F), and on December 5, 1980, entered its Order staying issuance of mandate during the pendency of this appeal. On December 24, 1980, in the Office of the Clerk of the Supreme Court of Illinois, appellant filed Notice of Appeal to the Supreme Court of the United States raising the questions here presented for review (Appendix G).

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT, FOR THEIR RESOLUTION

I. Reasons Supporting Jurisdiction:

Appellant is threatened with multiple prosecutions unless the holding of the Supreme Court of Illinois is reversed.

A proper defense of appellant requires separate trials, which the Illinois Courts must grant. *People* v. *Bricker* (1974), 23 Ill.App.3d 314, 319 N.E.2d 255; *People* v. *Halluin* (1976), 36 Ill.App.3d 556, 344 N.E.2d 579, 583; *People* v. *York* (1975), 29 Ill.App.3d 113, 329 N.E.2d 845, 848.

If the statute does not meet Federal standards of constitutionality, appellant should not be required to stand trial on any of the charges.

This Court, in accepting jurisdiction in *Cox Broadcasting Corp.* v. *Kohn* (1975), 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029, stated at 43 L.Ed.2d 328, 344:

> "...The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further

> review in the state courts.... They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even is appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court.... Delaying final decision of the First Amendment claim until after trial...will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality."

In the instant case, the Illinois Public Indecency Statute leaves, not merely the press, but every person and especially the appellant in the shadow of criminal sanctions of a . . ."statute the constitutionality of which is in serious doubt..."

Even the Illinois Supreme Court, in its opinion (Appendix A), stated with regard to the Illinois Public Indecency Statute:

> "Since the statute does not contain obscenity standards acceptable under *Miller* v. *California*...its validity would be highly suspect if it were applied to activities which implicate first amendment rights."

This concession followed that Court's acknowledgment that:

> "The defendant's argument has a certain surface appeal. The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment."

Thus, there lies a great similarity to *Cox* from a jurisdictional standpoint.

Moreover, whether First Amendment Rights or Privacy Rights are involved in the particular case, the same philosophy of *Cox* should apply in determining the jurisdictional question. These twin towers of constitutional liberty are co-equal on such an issue. Only when First Amendment Rights and Privacy Rights collide should there be a priority determination.

In *Mills* v. *Alabama* (1966), 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434, the State moved to dismiss the appeal on the grounds that the Alabama Supreme Court's judgment was not "a final judgment", and therefore not appealable under 28 U.S.C. 1257(2). This Court held that it had jurisdiction.

The only difference in *Mills* and the present case is that appellant here does not concede defeat, if tried. This difference, however, does not dilute the significance of *Mills* with respect to the dilemma of appellant wherein he may be subjected to multiple trials on charges based on an unconstitutional statute that would result in a great injustice, even if he be found not guilty on each of three successive trials, or, if found guilty on the third trial, required to again appeal to the Supreme Court of Illinois for it to formally repeat its rejection of appellant's constitutional contention whereupon the case would then "wind its weary way back..." (to this Court) "...as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a copletely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets...." (16 L.Ed.2d 487).

Most apt to the instant case is the concurring opinion of Justice Douglas and Justice Brennan (16 L.Ed.2d 489), which states:

> "Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be war-

> ranted in reviewing this case. That result follows a fortiori from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution...."

Here, both First Amendment Rights and Privacy Rights of others are threatened under the provisions of the Illinois Public Indecency Statute, and under *Cox* and *Mills,* ground for jurisdiction is present.

Other cases cited with approval in *Cox* support a finding of jurisdiction herein. Cox cites and quotes from *Radio Station WOW, Inc.* v. *Johnson* (1945), 326 U.S. 120, 89 L.Ed. 2092, 65 S.Ct. 1475. At 43 L.Ed.2d 340, 341, *Cox* states

> "...The federal issue was held reviewable here despite the pending accounting on the 'presupposition...that the federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a federal question...that may later come here....' 326 US, at 127, 89 L Ed 2092...."

There is no other federal question that may later come into the instant case. Therefore, review of the statute's constitutionality is the only federal question to be reviewed, and as stated in *Cox* (43 L.ed.2d 328, 339):

> "...immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' *Radio Station WOW, Inc.* v. *Johnson,...*"

Cox likewise cites with approval *Mercantile National Bank* v. *Langdeau* (1963), 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520. There, at 9 L.Ed.2d 526, the Court states:

> "...Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC Sec. 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear these appeals under Sec. 1257(2)..."

More pertinent than even the determination of place of trial in *Langdeau* is the determination of whether there ever need be a trial of appellant at all due to the unconstitutionality of the statute. This question is ripe for review.

II. **The Federal Questions Are Substantial:**

A.

The statutory language "lewd exposure of the body" found in Section 11-9(a)(3) of the Illinois Public Indecency Statute is "of such a standardless sweep" as to allow "policemen, prosecutors and juries to pursue their own predilections" contrary to the pronouncement of this Court in *Smith* v. *Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, 609, wherein the phrase, "treats contemptuously the flag of the United States," was held "void for vagueness" because "this absence of any ascertainable standard for inclusion or exclusion is precisely what offends the due process clause" and because it subjected the accused "to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preference for treatment of the flag."

There is no logical reason why those charged with lewd exposure of the body are not entitled to a standard set by the Legislature, at least as definite as must be provided for those charged with contemptuous treatment of the Nation's flag. *Connally* v. *General Const. Co.* (1926), 269 U.S. 385, 70 L.Ed.

328; *Bouie* v. *Columbia* (1964), 378 U.S. 347, 12 L.Ed.2d 894, 899; *Giacco* v. *Pennsylvania* (1966), 382 U.S. 399, 15 L.Ed.2d 447, 450; *Inter-state Circuit Inc.* v. *Dallas* (1968), 390 U.S. 676, 20 L.Ed.2d 225, 232; *Rabeck* v. *New York* (1968), 391 U.S. 462, 20 L.Ed.2d 741, 88 S.Ct. 1716.

The provisions of the Illinois Public Indecency Statute leave the jury with no *Miller* type standard as to what is meant "lewd".

In *Attwood* v. *Purcell* (1975 D.C. Arizona), 402 F.Supp.231, an Arizona statute almost identical to the Illinois statute was declared unconstitutional by a three judge panel.

The particular statute is as follows:

> "A person is guilty of a misdemeanor who wilfully and lewdly exposes his person or the private parts thereof in any public place or in a place where there are present other persons to be offended or annoyed thereby."

At page 234-236, the Court held:

> "We are of the opinion that A.R.S. Sec. 13-531 is unconstitutional due both to its vagueness and overbreadth.
>
> * * *
>
> "The Court has struck down as lacking the required specificity statutes which have used terms such as 'sexual promiscuity' (*Interstate Circuit Inc.* v. *City of Dallas,* 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968)) and 'would appeal to lust.' (*Rabeck* v. *New York,* 391 U.S. 462, 88 S.Ct. 1716, 20 L.Ed.2d 741 (1968)). We think that the terms 'wilfully and lewdly' are hardly more definite than those which have been struck down...."

Another three judge panel in *McCright* v. *Olson* (1973 D.C. North Dakota), 367 F.Supp. 937, held the North Dakota Obscenity Statute unconstitutional at page 944, stating that the statute,

> "...does not meet the requirements which *Miller* has set out for state statutes. It is overly broad and so ambiguous that it fails to provide adequate, fair notice of the criminal conduct to be regulated. Words such as 'salacious', 'lascivious', 'obscene', 'lewd' and 'indecent' are so void of common meaning when applied to a particular act or work that a person would have no way of determining whether his conduct or material violates the statute."

The Illinois Supreme Court erred in failing to strike down the statute for vagueness and overbreadth. In refusing to apply the overbreadth doctrine, the Illinois Supreme Court rejected *Attwood* v. *Purcell* (1975 D.C. Arizona), 402 F.Supp. 231, 236, characterizing it as "of questionable validity". At page 236, the *Attwood* court stated:

> We are also of the opinion that, (the statute), suffers from the Due Process infirmity of overbreadth. The statute is overbroad in its totality and in either of its parts...."

After citing and quoting from *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 45 L.Ed.2d 648, 95 S.Ct. 2561, the Court stated:

> "...It is not difficult to construct a situation in which the statute could be enforced in a constitutionally protected setting. A husband could in the privacy of the home expose a portion of his person to his wife in a 'wilfull and lewd' manner and she could be 'offended or annoyed thereby.' Of course such a state regulation literally applied in the privacy of one's home would be highly suspect if not unconstitutional per se."

Attwood was correctly decided and should have been followed rather than rejected by the Supreme Court of Illinois. There is no reason why the same result should not follow in this case.

The overbreadth doctrine should apply whether a criminal statute implicates First Amendment Rights, Privacy Rights, or

both. No rational case can be made for the proposition that a litigant may, through the application of the overbreadth doctrine, mount a constitutional attack against a criminal statute which infringes on protected expressive rights, whereas a litigant is prohibited from mounting such a constitutional attack on a criminal statute which infringes on privacy rights. A criminal statute which cuts across the face of the Bill of Rights, as does this one, should not stand and should be struck down on behest of anyone, who in his own house, is prosectued under its terms.

Moreover, the Illinois Public Indecency Statute does implicate First Amendment Rights, as well as Privacy Rights. There is nothing within it which would prevent prosecution of a performer on the public stage under its terms, whether or not the performance be done for gain. The overbreadth doctrine is therefore applicable, notwithstanding the Illinois Supreme Court's erroneous holding that First Amendment activities are not within the scope of the statute.

Even so, the Illinois Supreme Court acknowledges in its opinion that:

> "Although the overbreadth doctrine does apply when first amendment expressive rights are implicated, we reject the premise of defendant's first amendment overbreadth argument in regard to this statute: that the statute on its face infringes protected expressive rights. The defendant's argument has a certain surface appeal. The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment. Since the statute does not contain obscenity standards acceptable under *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, its validity would be highly suspect if it were applied to activities which implicate first amendment rights...."

This Court, in *Ward* v. *Illinois* (1977), 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085, by a 5 to 4 decision, upheld the Il-

linois Obscenity Statute over a serious question as to whether the statute's *Miller* type standards were sufficient. Both the majority and minority there considered whether that statute was overbroad. It follows that the overbreadth doctrine should also apply in considering the Illinois Public Indecency Statute; otherwise, an unsound distinction would result based on nothing but semantics, namely: the legislative choice of the words, "lewd exposure of the body", in the Public Indecency Statute, instead of the words "obscene exhibition of his body" as used in the Obscenity Statute.

Also, in its opinion, the Illinois Supreme Court erroneously held the exposure of a male sex organ to be "conduct which clearly constitutes a lewd exposure." This holding overlooks the fact that such is normally exposed in a home several times a day, and that nudity is not per se lewd or obscene. *Hearn* v. *District of Columbia* (1962), 178 A.2d 434, 94 A.L.R.2d 1348, 1352.

The fact that such exposure is seen by others does not change the act of exposure from a normal act to a lewd act. The physical act is the same whether seen or not, and the unseen subjective intent of the actor has nothing to do with what is visible to the viewer.

If the highest Court in the State erroneously concluded from this standardless statute that exposure of a male sex organ is per se a "lewd exposure of the body", what next must we expect a jury to conclude with regard to what exposure of the body is lewd or not lewd when turned loose without standards to judge an accused under this statute?

This is a perfect example of the error which results from a vague, standardless statute without *Miller* type standards.

This is the reason no one should be tried under this statute and why the questions herein are so substantial as to require a plenary consideration by this Court.

B.

A comparison between the Illinois Public Indecency Statute[5] proscribing "a lewd exposure of the body", and the Illinois Obscenity Statute[6], which makes criminal "an obscene exhibition of his body for gain," demonstrates an unreasonable and arbitrary classification condemned under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In *Harvey* v. *Clyde Park District* (1964), 32 Ill.2d 60, 203 N.E.2d 573, at 575, the Court stated:

> "...The circumstance that the alleged arbitrary discrimination results from a statutory pattern rather than from a single statute has not barred consideration of claims of violation of the equal protection clause of the 14th amendment to the Constitution of the United States,... (citing cases)..."

In *Harvey,* the arbitrary classification resulted from a comparison of two statutes.

As stated in *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 31 L.Ed.2d 768, at page 777:

> "...The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.... (citing cases) The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

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[5]Chap. 38, pars. 11-9(a)(3), 11-9(b), Illinois Revised Statutes, 1977.

[6]Chap.38, par. 11-20, Illinois Revised Statutes, 1977.

Whether an exposure of the body takes place in the home or on the stage, the actor is subject to prosecution under the standardless Illinois Public Indecency Statute for a "lewd exposure of the body" while a person performing the identical act on a public stage for gain cannot be prosecuted for an "obscene exhibition of his body" unless the *Miller* type standards of the Illinois Obscenity Statute are met. There is no rational reason to accord the former less protection than the latter. There is no legitimate state interest promoted by such an arbitrary classification.

Therefore, First Amendment Rights and Privacy Rights are threatened and do not receive the same protection under the Illinois Public Indecency Statute as they do under the Illinois Obscenity Statute. Appellant will be denied equal protection if prosecuted on the charges filed against him.

C.

The Illinois Supreme Court erroneously broadened and enlarged the meaning of the Illinois Public Indecency Statute in permitting the State to prosecute for acts done in a private home, whereas the terms of the statute criminalize only those acts done in a public place.

This ex post facto judicial enlargement runs contrary to *Bouie* v. *Columbia* (1964), 378 U.S. 347, 84 S.Ct.1697, 12 L.Ed.2d 894, 899-900, and has resulted from the erroneous holding that the term public place means "any place where the conduct may reasonably be expected to be viewed by others." This judicial substitution of the word "expected" for the word "excepted" in paragraph 11-9(b) is a departure from the Illinois rule requiring penal statutes to be construed strictly in favor of an accused rather than against him. *People* v. *Lutz* (1978), 73 Ill.2d 204, 383 N.E.2d 171, 22 Ill. Dec. 695, 698, and which rule of strict construction has long been required by this Court based on the ancient principle stated by Chief Justice Marshal for the Court in *United States* v. *Wiltberger,* 18 U.S. 5 Wheat. 76, 96, 5 L.Ed. 37, at 42:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals;...It is the legislature, not the court, which is to define a crime, and ordain its punishment."

A properly applied strict construction should not broaden this statute to include "private home" within the definition of "public place".

The statute's title, "Public Indecency", and paragraph 11-9(a)(1) and (3) which reads: "Any person...who performs" (the acts) "in a public place commits a public indecency..." establishes that acts of "sexual intercourse" and "lewd exposure of the body" are only prohibited if done in a public place.

Paragraph 11-9(b), as enacted by the Legislature, reads: " 'Public place' means any place where the conduct may reasonably be *excepted* to be viewed by others." (emphasis ours) This language does not provide that such acts done in a private home are subject to punishment. The statutory compiler's footnote referred to in the Illinois Supreme Court's Opinion, to-wit, "probably should read 'expected' ", does not cure the vagueness of the term inasmuch as a statutory compiler has no more power to change statutes than any other reader of legislative enactments. Moreover, the Illinois Revised Statutes of 1973, 1975 and 1977 all contain the word "excepted", and the Legislature enacted no change in the statute during those years and prior to the filing of charges against appellant. If the Illinois Legislature had attempted to change the word "excepted" to read "expected" after the date of the alleged acts, such legislative attempt would constitute an ex post facto law barred from application against appellant.

Under *Bouie* v. *Columbia* (1964), 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, 899-900, the Illinois Supreme Court is

likewise "barred by the Due Process Clause from achieving precisely the same result by judicial construction."

As in *Bouie,* at page 899, "judicial enlargement" of a criminal statute "is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness" and the objection of vagueness in the statute cannot be "cured retrospectively" by a ruling of the Illinois Supreme Court in this case.

Moreover, this statute as interpreted by the Illinois Supreme Court results in a breach of constitutionally protected rights of Privacy which have been held by this Court to exist in the penumbra of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States. *Stanley* v. *Georgia* (1969), 394 U.S. 557, 22 L.Ed.2d 542; *Griswold* v. *Connecticut* (1965), 381 U.S. 479, 14 L.Ed.2d 510, 514-517.

The thrust of *Stanley* rests on the privacy of one's house, a basic freedom that is independently saved by the Constitution.

Under the Illinois Supreme Court's construction, the statute is so broad in scope that a prosecutor could prosecute and a jury could convict on an act taking place totally within the home viewed only by the spouse, or by an act within the home seen by a passerby through the unintended inadvertence or carelessness of the actors in the home. If the window is inadvertently left unshaded and the act of sexual intercourse or "lewd exposure of the body" is viewed by a passerby, prosecution and conviction under the terms of the statute so construed may result.

The rule of strict construction of penal statutes should be applied to prevent a construction which broadens and enlarges the statute and which totally changes the ordinary concept of public place to mean a private home. Appellant should be accorded the standing to raise not only the breach of his own privacy rights, but also the overbreadth effect of the statute on the privacy rights of others.

Consequently, the Illinois Public Indecency Statute, as construed by the Illinois Supreme Court, should be struck down.

D.

Nowhere in the statute is there any requirement that the actor intend his conduct to be viewed by any member of the public. The only words of intent appearing in the statute, (Par. 11-9(a)(3)), are that the actor "intend to arouse or satisfy the sexual desire of the person," namely the actor. Such a fundamental omission cannot be supplied by the prosecutor inserting the allegation of intent to be seen into the Information and by assuming the burden of proof, nor can the Court correct the legislative omission by judicial legislation. The Illinois Supreme Court overlooked its holding in *People* v. *Klick* (1977), 66 Ill.2d 269, 362 N.E.2d 329, 5 Ill.Dec. 858, 860, wherein it refused to supply the missing element in the statute there under consideration and stated, "This we cannot do." Here again, the State Legislature could not cure this defect so as to apply to appellant by enactment of an amendatory statute. As stated by this Court in *Bouie* v. *Columbia* (1964), 378 U.S. 347, 12 L.Ed.2d 894, at page 900:

> "...If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Any insertion of this missing statutory element of "intent to be seen", whether by allegations of a prosecutor or judicial construction by a Court, violates due process rights under the Fourteenth Amendment to the United States Constitution.

Scienter is lacking. The statute states no crime. As stated in *McCright* v. *Olson* (1973 D.C. North Dakota), 367 F.Supp. 937, at 945:

> "In addition to being vague,..." (the statute) "...is also unconstitutional in its failure to provide for scienter. In *Smith* v. *California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1953), the Court made it clear that a person cannot be made criminally liable without knowledge of the contents of what he is selling:..."

Similarly, this peculiar standardless example of defective legislation entitled "Public Indecency" does not even require that the actor in his home intend to be seen by the public, nor does it require that his actions arouse or affect anyone but himself.

This peculiar statute, a complete departure from the traditional crime of Public Indecency, leads to the following ludicrous result under the Illinois Supreme Court's construction of the statute: Assume two persons doing nothing of a physical nature other than standing naked in a private home or public street in an identical manner. The first is acquitted, even though admitting his intention to shock and arouse the viewers of his act. The second is convicted based only on the jury's speculation that the unseen, unspoken, subjective intent of the actor was to arouse no one but himself in doing the same act in the same manner for which the first actor had been acquitted. Such authorized selectivity based on personal predilections of prosecutors and jurors does not accord with the due process requirements of this Court as set forth in *Smith* v. *Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, 609.

CONCLUSION

No one should be subjected to trial under this vague, overbroad statute which states no crime and threatens not only Privacy Rights but First Amendment Rights as well. This statute, when weighed in the constitutional balances, is found wanting.

For the above reasons, appellant prays that this Honorable Court note probable jurisdiction of this appeal, and permit appellant to file his brief on the merits and give oral argument in support of his position.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of Supreme Court of Illinois.

Docket No. 52750—Agenda 11—May 1980

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

GARY "MIKE" GARRISON,
Appellee.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

The circuit court of Marion County declared unconstitutional sections 11-9(a)(3) and 11-9(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, pars. 11-9(a)(3), 11-9(b)). The State has appealed directly here pursuant to our Rule 302(a)(1) (73 Ill. 2d R. 302(a)(1)). We reverse.

The defendant, Gary "Mike" Garrison, was charged by information with "knowingly, at a public place, while standing behind a storm door, expose[ing] his sex organ in a lewd manner" to the prosecutrix "with the intent to arouse his sexual desires" in violation of section 11-9(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 11-9(a)(3)). Section 11-9 provides:

> "Public Indecency. (a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> (1) An act of sexual intercourse; or
>
> (2) An act of deviate sexual conduct; or
>
> (3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person; or

(4) A lewd fondling or caress of the body of another person of either sex.

(b) 'Public place' for purposes of this Section means any place where the conduct may reasonably be excepted to be viewed by others.

(c) Sentence.

Public indecency is a Class A misdemeanor."

Defendant moved to dismiss the information on the ground that sections 11-9(a)(3) and 11-9(b) violated the first, third, fourth, fifth, sixth, ninth and fourteenth amendments to the United States Constitution, and he reiterates those arguments here. The remarks of the trial judge at the hearing suggest that he relied on only one of the arguments, but he signed an order drafted by the defendant which incorporated by reference all the contentions raised in the motion to dismiss.

For purposes of analysis, the defendant's contentions fall into four main categories. He argues: (1) that the statute applied in this case violates his privacy rights; (2) that the statute is overbroad and therefore unconstitutional on its face; (3) that it is so vague that it violates constitutional guarantees of due process; and (4) that a comparison of sections 11-9 and 11-20 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, pars. 11-9, 11-20) reveals a legislative classification not reasonably related to a legitimate governmental purpose, thus denying him equal protection of the laws.

Defendant's argument that this prosecution violates his privacy rights rests upon the decision of the United States Supreme Court in *Stanley* v. *Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243. In *Stanley,* the defendant had been convicted of possessing obscene material in violation of Georgia law. The material was discovered when State agents searched Stanley's home pursuant to a search warrant authorizing them to search for equipment, records, and other material used in or

derived from an illegal wagering business. The Supreme Court reversed the conviction, holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." (*Stanley* v. *Georgia* (1969), 394 U.S. 557, 568, 22 L. Ed. 2d 542, 551, 89 S. Ct. 1243, 1249.) The opinion of the court emphasized the right of the individual to read or view whatever books or films he pleases in the privacy of his own home. In a subsequent case, *United States* v. *Reidel* (1971), 402 U.S. 351, 28 L. Ed. 2d 813, 91 S. Ct. 1410, however, the Supreme Court limited *Stanley* to factual situations which do not involve actions outside the home. The decision in *Reidel* upheld the validity of a Federal statute which made criminal the mailing of obscene material even though the recipients were adults who had requested the mailing and who, under *Stanley,* were entitled to view the materials privately in their own homes.

Applying the principles of *Stanley* and *Reidel* to the facts of this case, we conclude that this prosecution does not unconstitutionally invade the defendant's right to privacy. The information charged the defendant with exposing himself by standing at a storm door at 404 Melrose in Centralia. The oral argument in the trial court and the briefs in this court indicate that the Melrose address is the defendant's residence. Although the action with which defendant is charged thus took place within the confines of his home, its essential characteristic for the purpose of our consideration is that the defendant "knowingly" made it visible to the prosecutrix outside his house. Under the circumstances alleged in the information, *Stanley* does not preclude the prosecution of the defendant.

The argument that the statute is overbroad rests on the premise that the statute may allow criminal prosecution in some situations in which the activities of a hypothetical defendant fall within areas protected by the right of privacy and the first amendment right of expression. In regard to the privacy argument, we need not decide whether that premise is accurate; the overbreadth doctrine does not apply to privacy rights. *Lovisi* v.

Slayton (E.D. Va. 1973), 363 F. Supp. 620, 627-29, *aff'd* (4th Cir. 1976) (*en banc),* 539 F.2d 349, *cert. denied* (1976), 429 U.S. 977, 50 L. Ed. 2d 585, 97 S. Ct. 485; *Harris* v. *United States* (D. C. App. (1974)) (*en banc),* 315 A.2d 569, 575; *Pedersen* v. *City of Richmond* (1979), _____ Va. _____, _____, 254 S.E.2d 95, 99.

As a general rule a defendant may not avoid his prosecution because a similar prosecution of other individuals under the same statute might violate their constitutional rights. *(Burch* v. *Louisiana* (1979), 441 U.S. 130, 60 L. Ed. 2d 96, 99 S. Ct. 1623; *Bates* v. *State Bar* (1977), 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691; *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908; *McGowan* v. *Maryland* (1961), 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101; *People* v. *Bombacino* (1972), 51 Ill. 2d 17; *City of Chicago* v. *Lawrence* (1969), 42 Ill. 2d 461 *cert. denied* (1969), 396 U.S. 39, 24 L. Ed. 2d 208, 90 S. Ct. 263; *People* v. *Reiner* (1955), 6 Ill. 2d 337.) The overbreadth doctrine is an exception to this rule. It allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the first amendment, even though those rights do not protect the activities of the defendant. *(Bates* v. *State Bar* (1977), 433 U.S. 350, 380, 53 L. Ed. 2d 810, 833, 97 S. Ct. 2691, 2707; *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 611-17, 37 L. Ed. 2d 830, 839-43, 93 S. Ct. 2908, 2915-18.) The issue now before us, however, is whether the defendant may avoid this prosecution if the statute may be applied to violate the privacy rights of others. Apart from a reference of questionable validity in *Attwood* v. *Purcell* (D. Ariz. 1975), 402 F. Supp. 231, 236, the defendant has not cited any case extending the overbreadth doctrine to privacy rights; nor have we found any. The overbreadth doctrine may be necessary to protect certain easily inhibited first amendment expressive and associational rights, but it should be applied very sparingly, even when dealing with those rights. *(Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 613, 37 L. Ed. 2d 830, 840-41,

93 S. Ct. 2908, 2916; *cf. Bates* v. *State Bar* (1977), 433 U.S. 350, 380-81, 53 L. Ed. 2d 810, 833-34, 97 S. Ct. 2691, 2707-08; *Talsky* v. *Department of Registration & Education* (1977), 68 Ill. 2d 579, 590.) Unlike the actions with which the defendant is charged here, and unlike expressive and associational activities which generally occur in public, the activities which are protected by the right of privacy are by their nature generally unknown to prosecutors and therefore are not easily inhibited by official action. We do not believe that privacy rights require the protection of an overbreadth doctrine to secure their free exercise, and we consequently decline to allow one whose personal right of privacy has not been violated to assert the hypothetical rights of others. See *Lovisi* v. *Slayton* (E.D. Va. 1973), 363 F. Supp. 620, 627-29, *aff'd* (4th Cir. 1976) (*en banc*), 539 F.2d 349, *cert. denied* (1976), 429 U.S. 977, 50 L. Ed. 2d 585, 97 S. Ct. 485; *Harris* v. *United States* (D.C. App. 1974) (*en banc*), 315 A.2d 569, 575; *Pedersen* v. *City of Richmond* (1979), _____ Va. _____, _____, 254 S.E.2d 95, 99.

Defendant also alludes to *Eisenstadt* v. *Baird* (1972), 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029, as support for his contention that he should be able to assert the privacy rights of others not involved in this litigation. *Eisenstadt*, however, is not apposite to this case. The gist of *Eisenstadt* is that a defendant may be heard to assert the rights of nonparties when their rights are affected by the prosecution and the statute is so worded or applied that they will not be prosecuted under it. The defendant does not assert the existence of any such individuals and we do not perceive any. The defendant therefore is limited to asserting violations of his privacy rights and as indicated above, we do not find any.

Although the overbreadth doctrine does apply when first amendment expressive rights are implicated, we reject the premise of defendant's first amendment overbreadth argument in regard to this statute: that the statute on its face infringes protected expressive rights. The defendant's argument has a certain

surface appeal. The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment. Since the statute does not contain obscenity standards acceptable under *Miller* v. *California* (1973), 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, its validity would be highly suspect if it were applied to activities which implicate first amendment rights. *(Doran* v. *Salem Inn, Inc.* (1975), 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561; *Attwood* v. *Purcell* (D. Ariz. 1975), 402 F. Supp. 231; *Salem Inn, Inc.* v. *Frank* (E.D.N.Y. 1974), 381 F. Supp. 859, *aff'd* (2d Cir. 1975), 522 F.2d 1045; *City of Revere* v. *Aucella* (1975), 369 Mass. 138, 338 N.E.2d 816; *Koppinger* v. *City of Fairmont* (1976), 311 Minn. 186, 248 N.W.2d 708; *cf. California* v. *La Rue* (1972), 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390; *Yauch* v. *State* (1973), 109 Ariz. 576, 514 P.2d 709; *Crownover* v. *Musick* (1973), 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681, *cert. denied* (1974), 415 U.S. 931, 39 L. Ed. 2d 489, 94 S. Ct. 1443; *Wright* v. *Town of Huxley* (Iowa 1977), 249 N.W.2d 672.) We find, however, that activities which are primarily expressive are not within the scope of the statute.

An examination of the statutory scheme of which section 11-9 is a part and the history of prosecutions under the statute reveals that it does not impinge on first amendment rights. Section 11-9 is part of article 11 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, pars. 11-1 through 11-22), which is titled "Sex Offenses." Also within article 11 is section 11-20, titled "Obscenity," which makes criminal the acts of one who knowingly or recklessly:

> (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or
>
> (2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene. (Ill. Rev. Stat. 1977, ch. 38, par. 11-20(a).)

This statute, which also includes a definition of "obscenity," has been upheld on the basis that it incorporates the *Miller* standards. *(Ward* v. *Illinois* (1977), 431 U.S. 767, 52 L. Ed. 2d 738, 97 S. Ct. 2085, *aff'g People* v. *Ward* (1976), 63 Ill. 2d 437.) This statute criminalizes those activities which offend sexual morals and which, although expressive in nature, are not protected by the first amendment since they are obscene. Ill. Ann. Stat., ch. 38, par. 11-9, Committee Comments (Smith-Hurd 1979).

In contrast, section 11-9, as we view it, is aimed at public displays which do not involve first amendment rights. Such displays may be prohibited without reference to the constitutional obscenity standard, because they do not involve primarily expressive activities. This view of the statute is reinforced by the history of prosecution under it. In no reported case under section 11-9 has the State attempted to prosecute a defendnat for activities within the scope of first amendment concerns. (See, *e.g., People* v. *Giacinti* (1976), 44 Ill. App. 3d 699; *People* v. *Legel* (1974), 24 Ill. App. 3d 554; *People* v. *Mikota* (1971), 1 Ill. App. 3d 114; *People* v. *Tadla* (1969), 110 Ill. App. 2d 119.) Because section 11-9 does not apply to activities that are primarily expressive in nature and which may not be prohibited

absent a finding that they are obscene within the constitutional standard, defendant's contention that the statute is overbroad must be rejected.

The defendant also contends that sections 11-9(a)(3) and 11-9(b) are so vague that any prosecution under those provisions constitutes a denial of due process. The due process vagueness standard comprises three elements. First, the statute must not be so vague that men of common intelligence must necessarily guess at its meaning or application. *(Smith* v. *Goguen* (1974), 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242; *Grayned* v. *City of Rockford* (1972), 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294; *Connally* v. *General Construction Co.* (1926), 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126; *People* v. *Palkes* (1972), 52 Ill. 2d 472.) Second, the statute must provide sufficiently definite standards for law-enforcement officers and triers of fact that its application does not depend merely on their private conceptions. *(Grayned* v. *City of Rockford* (1972), 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294; *Interstate Circuit, Inc.* v. *City of Dallas* (1968), 390 U.S. 676, 20 L. Ed. 2d 225, 88 S. Ct. 1298; *Giaccio* v. *Pennsylvania* (1966), 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518; *People* v. *Pembrock* (1976), 62 Ill. 2d 317.) Finally, if the statute implicates first amendment expressive rights, it must not be so vague as to chill their free exercise. *(Grayned* v. *City of Rockford* (1972), 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294.) The last element need not concern us since, as we noted above, the statute at issue in this case does not impinge on first amendment rights.

Although a statute must be declared void if it does not adequately warn potential violators of the conduct proscribed or if it does not provide adequate standards for triers of fact, that determination is made in the factual context of each case in light of the facts in the case at hand where first amendment freedoms are not involved. *(United States* v. *Mazurie* (1975), 419 U.S. 544, 42 L. Ed. 2d 706, 95 S. Ct. 710.) In such cases the underlying requirement of due process is that an individual cannot be

held to have violated a statute unless he could reasonably be expected to understand that his particular conduct was proscribed. *(Bouie* v. *City of Columbia* (1964), 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697; *United States* v. *Harriss* (1954), 347 U.S. 612, 98 L. Ed. 989, 79 S. Ct. 808.) A defendant therefore may be prosecuted under a statute without violating his due process rights if his conduct clearly falls within the statutory proscription even though the statute may be vague as to other conduct. *Smith* v. *Goguen* (1974), 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242; *Dombrowski* v. *Pfister* (1965), 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116; *United States* v. *National Dairy Products Co.* (1963), 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594; *United States* v. *Raines* (1960), 362 U.S. 17, 4 L. Ed. 2d 524. 80 S. Ct. 519; *United States* v. *Harriss* (1954), 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808; *People* v. *Vandiver* (1971), 51 Ill. 2d 525.

The specific parts of section 11-9 which the defendant is charged with violating provide:

> "(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> ***
>
> (3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person;
>
> ***
>
> (b) 'Public place' for the purposes of this Section means any place where the conduct may reasonably be *excepted* to be viewed by others." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 38, pars. 11-9(a)(3), 11-9(b).

The defendant contends that the statutory definition of "public place" is unconstitutionally vague because the use of the word "excepted" renders it unintelligible, or alternatively, if "excepted" is read as "expected," because the definition is

otherwise inadequate. We believe that the legislature clearly intended to use the word "expected." As passed by the General Assembly the bill containing section 11-9 contained the word "expected" (1961 Ill. Laws 1983, 2008), as did a subsequent amendment reproducing the entire section for the purpose of showing changes (1972 Ill. Laws 1717, 1724). The committee comments also indicate that the legislature intended to use "expected." (Ill. Ann. Stat., ch. 38, par. 11-9, Committee Comments, at 304 (Smith-Hurd 1979).) Moreover, both of the statutory compilations footnote the word "excepted" in the statute and indicate that it should probably read "expected." (Ill. Rev. Stat. 1977, ch. 38, par. 11-9(b); Ill. Ann Stat., ch. 38, par. 11-9(b) (Smith-Hurd 1979).) The transposition apparently occurred during the enrolling and engrossing process and passed unnoticed. The cardinal rule of statutory construction is to effectuate the intent of the legislature. *(Carey* v. *Elrod* (1971), 49 Ill. 2d 464, 471; *People ex rel. Community High School District No. 231* v. *Hupe* (1954), 2 Ill. 2d 434.) When necessary to achieve that goal a court may alter, supply or modify words and correct obvious mistakes. *(Community Consolidated School District No. 210* v. *Mini* (1973), 55 Ill. 2d 382, 386-87; *Du Bois* v. *Gibbons* (1954), 2 Ill. 2d 392; *People ex rel. Barrett* v. *Anderson* (1947), 398 Ill. 480.) We therefore interpret the statute as though it contained the word "expected." This construction does not affect the validity of this prosecution because the presence of the footnotes in both of the statutory compilations adequately warned the defendant of the intention of the legislature.

Nor do we believe that the statutory definition of "public place" is otherwise overly vague. Although the facts have not yet been fully developed in this case, the allegations in the information charging the defendant indicate that the defendant's activities occurred in a place that falls squarely within the statutory definition of a "public place." If the facts adduced at trial substantiate the allegations, the situation would be one in which the defendant could clearly expect to be seen by others.

Hypothetical situations might be conceived in which neither a defendant nor a trier of fact could reasonably determine whether the conduct occurred in a public place as defined by the statute, but those cases are not before us now and the defendant is not entitled to raise them. Moreover, the legislature has provided a reasonable definition of "public place" which should not be invalidated merely because it attempts to define that expression rather than to list every location which may be a "public place". *Cf. People* v. *Parkins* (1979), 77 Ill. 2d 253.

Similar considerations also lead us to reject defendant's contention that the statutory expression "lewd exposure" is unconstitutionally vague. The information charged the defendant with exposing his sex organ, conduct which clearly constitutes a lewd exposure, and he may not pose hypothetical situations in which the statutory standards might conceivably be unconstitutionally vague. Furthermore, such situations are highly unlikely. The common understanding of expressions like "lewd exposure" indicates, in the words of the Supreme Court of Washington, "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." *(State* v. *Galbreath* (1966), 69 Wash. 2d 664, 668, 419 P.2d 800, 803; see also *Hoffman* v. *Carson* (Fla. 1971), 250 So. 2d 891, *appeal dismissed* (1971), 404 U.S. 981, 30 L. Ed. 2d 365, 92 S. Ct. 453; *State* v. *Borchard* (1970), 24 Ohio App. 2d 95, 264 N.E.2d 646, *cf. Commonwealth* v. *Heinbaugh* (1976), 467 Pa 1, 354 A.2d 244.) These areas include the genitals, buttocks and female breasts. The area which the defendant is charged with exposing clearly falls within this categorization.

Defendant also contends that the statutory scienter requirement, "intent to arouse or to satisfy the sexual desire of the person," is unconstitutionally vague, but this contention is without merit. The standard is clearly stated. This provision requires that the accused have intended to arouse or satisfy himself by

exposing himself to others. It therefore precludes prosecution under section 11-9(a)(3) for mere inadvertent or accidental exposure. The actual intent of the defendant may, of course, be inferred by the trier of fact from the surrounding circumstances, and that evaluation is subject to judicial review.

The defendant's equal protection argument is equally unmeritorious. Its gist is that the prosecution of some defendants under the obscenity statute (Ill. Rev. Stat. 1977, ch. 38, par. 11-20) while others are prosecuted under section 11-9 unfairly burdens those who fall into the latter category because the elements of the obscenity offense are more narrowly drawn and more difficult to prove. As defendant acknowledges in his brief, however, the statutory classification need only be rationally related to a legitimate State purpose to satisfy the equal protection standard. *(Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400.) The purpose of the standards in the obscenity statute is to protect first amendment rights, certainly a legitimate governmental objective. The Supreme Court has held that they adequately serve that purpose. *(Ward* v. *Illinois* (1977), 431 U.S. 767, 52 L. Ed. 2d 738, 97 S. Ct. 2085.)

For the aforementioned reasons we reverse the judgment of the circuit court and remand the cause for further proceedings.

Reversed and remanded.

APPENDIX B

Final Order of Trial Court Dated October 17, 1979, granting appellant's Motion to Dismiss the cases filed against him.

IN THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

Nos. 78-CM-180 and 78-CM-400

The People of the State of Illinois

vs.

Gary "Mike" Garrison,
Defendant.

ORDER

This matter coming on for hearing on the Motions of defendant to dismiss the Informations, and each Count thereof, and each of the above captioned matters, and the parties by respective counsel being present, arguments are made and Memorandum in support of said Motions is submitted, and the Court being fully advised in the premises, finds that the Motions to dismiss the Informations, and each Count thereof, filed in the above enetitled causes be and the same are hereby granted on the grounds that the statute, being Chapter 38, Section 11-9(a)(3) and (b), Illinois Revised Statutes, 1977 State Bar Association Edition, is impermissibly vague and overbroad, depriving those charged under the terms thereof, including this defendant, of due process and does not advise persons charged under the terms of said statute of what "public place" means as defined by said statute, and is violative of the Fourteenth Amendment to the United States Constitution, and under Article I, Sections 2 and 8 of the Illinois Constitution, in that no

reasonable person can be certain of what the Legislature meant by the phrase "excepted to be viewed by others." The statute is unconstitutional under the Fourteenth Amendment to the United States Constitution, and Article I, Sections 1, 2, 6, 8, 12 and 24 of the Constitution of the State of Illinois, and Article IV, Section 13 of the Illinois Constitution of 1970, and the First, Third, Fourth, Fifth, Sixth and Ninth Amendments to the United States Constitution, as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States, for the reasons set forth in said Motions.

WHEREFORE, IT IS ORDERED that said Informations in the above captioned causes, and each Count thereof, be dismissed, and the defendant herein may go hence without day.

ENTER:

/s/ HARRY L. ZIEGLER
JUDGE

DATED: October 17, 1979.

APPENDIX C

Order of Trial Court dated August 16, 1978, dismissing Information and granting Special Prosecutor leave to file Amended Information and staying prosecution pending a review of the constitutionality of the Statute.

IN THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

No. 78-CM-180

The People of the State of Illinois

vs.

Gary "Mike" Garrison,
Defendant.

ORDER

This matter comes on for hearing on Section I of defendant's Motion to dismiss the Information, and the Court, after hearing argument and receiving briefs from defendant's counsel, grants the request of the Special Prosecutor for time to reply. This matter again comes on for hearing August 11, 1978, and the Court, after hearing further arguments of the Special Prosecutor and counsel for defendant, hereby denies Section I of defendant's Motion. The matter again comes on for hearing August 11, 1978 on Section II of defendant's Motion to dismiss the Information, and each Count thereof, and the Court, having considered the same and having heard and considered the arguments of counsel and being fully advised in the premises finds that the Motion should be allowed. IT IS THEREFORE ORDERED that the Information and each Count thereof be and the same is hereby dismissed. On Motion of the Special Prosecutor, leave is hereby granted to file an Amended Infor-

mation on or before August 28, 1978. IT IS FURTHER ORDERED that upon the filing of such Amended Information by the People, all matters herein are stayed pending a review of the constitutionality of the statute involved herein by the Appellate and Supreme Courts of Illinois and/or the United States District Court.

It is the further finding and Order of this Court, pursuant to Section 308 of the Illinois Supreme Court Rules, that there is substantial ground for difference of opinion on the question of the constitutionality of the Statute upon which the Information was based, being Chapter 38, Section 11-9(a)(3) and (b), Illinois Revised Statutes, 1977 State Bar Association Edition, which reads as follows:

> "(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> * * *
>
> "(3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person;...
>
> * * *
>
> "(b) 'Public place' for purposes of this Section means any place where the conduct may reasonably be excepted to be viewed by others."

It is the further finding of this Court that an immediate appeal from the Order denying Section I of defendant's Motion may materially advance the ultimate termination of the litigation. The question of law involved is whether or not the said statute is unconstitutional under the Fourteenth Amendment to the United States Constitution, and Article I, Sections 1, 2, 6, 8, 12 and 24 of the Constitution of the State of Illinois, and Article IV, Section 13 of the Illinois Constitution of 1970, and the First, Third, Fourth, Fifth, Sixth and Ninth Amendments to the

United States Constitution as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States.

ENTER:

/s/ HARRY L. ZIEGLER
JUDGE

DATED: August 16, 1978.

APPENDIX D

Amended Informations Filed in Trial Court.

IN THE CIRCUIT COURT,
FOR THE FOURTH JUDICIAL CIRCUIT OF ILLINOIS
MARION COUNTY, HILLSBORO, ILLINOIS

Criminal
No. 78-CM-180

The People of the State of Illinois

vs.

Gary "Mike" Garrison
Defendant.

INFORMATION

The Special Prosecutor of Marion County, Illinois, charges:

Count I (Class A)

That on April 6, 1978 at approximately the hour of 8:05 a.m. at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDECENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did knowingly, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Christine Holway with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

INFORMATION

The Special Prosecutor of Marion County, Illinois, charges:

Count II (Class A)

That on April 5, 1978 at approximately the hour of 7:55 a.m. at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDECENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Christine Holway with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

INFORMATION

The Special Prosecutor, of Marion County, Illinois, charges:

Count III (Class A)

That on April 5, 1978 at approximately the hour of 7:55 a.m. at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDECENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did knowingly, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Christine Holway with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

INFORMATION

The Special Prosecutor of Marion County, Illinois, charges:

Count IV (Class A)

That on April 6, 1978, at approximately the hour of 8:05 a.m. at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDECENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Christine Holway with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

IN THE CIRCUIT COURT,
FOR THE FOURTH JUDICIAL CIRCUIT OF ILLINOIS
MARION COUNTY, HILLSBORO, ILLINOIS

Criminal
No. 78-CM-400

The People of the State of Illinois

vs.

Gary "Mike" Garrison
Defendant.

INFORMATION

The Special Prosecutor of Marion County, Illinois, charges:

Count I (Class A)

That on April, 1977 at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDENCENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did knowingly, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Dee Dee Cole with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

INFORMATION

The Special Prosecutor of Marion County, Illinois, charges:

Count II (Class A)

That on April, 1977 at 404 Melrose in the City of Centralia, Marion County, in Illinois

GARY "MIKE" GARRISON committed the offense of PUBLIC INDECENCY in that

> GARY "MIKE" GARRISON, a person of the age of 17 years and upwards, did, at a public place, while standing behind a storm door, expose his sex organ in a lewd manner to Dee Dee Cole with the intent to arouse his sexual desires

in violation of Chapter 38, Paragraph 11-9(a)(3), Illinois Revised Statutes, which is Section 11-9(a)(3) of the Criminal Code of 1961 as amended.

APPENDIX E

Petition for Rehearing in Supreme Court of Illinois filed by Appellant on the 17th day of October, 1980.

No. 52750

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois, Plaintiff-Appellant, vs. Gary "Mike" Garrison, Defendant-Appellee.	Original Appeal from the Circuit Court of the Fourth Judicial Circuit, Marion County, Illinois Nos. 78-CM-180 and 78-CM-400 Honorable Harry L. Ziegler Judge Presiding

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Now comes the appellee, Gary "Mike" Garrison, and Petitions this Court for a Rehearing of the decision and opinion of this Court filed September 29, 1980. Petitioner sets forth the following points in support of his Petition for Rehearing.

I.

The opinion of the Court misapprehends defendant's position on the question of scienter. The opinion ignores the argument of defendant on one of the greatest flaws in the statute—*the failure of the statute to require that the actor intend the public to see the act.*

No where in the statute is there any requirement that the actor intend his conduct to be viewed by any member of the public. The only intent required is that the actor "intend to arouse or satisfy the sexual desire of the person", namely, the actor.

The opinion at page 9 states:

> "...This provision requires that the accused have intended to arouse or satisfy himself *by exposing himself to others.* It therefore precludes prosecution under section 11-9(a)(3) for mere inadvertent or accidental exposure...."

This statement in the opinion is wrong. There is no statutory requirement that the state prove that *an accused intend a member of the public to view his actions.* A reading of the statute discloses that this vital element of *intent to be seen* by others is simply not there. Such a fundamental omission cannot be supplied by the prosecutor inserting the allegation of intent to be seen into the information and by assuming the burden of proof, nor can the Court correct the legislative omission by judicial legislation.

The opinion ignored this element of the case which was clearly raised in defendant's Brief at Points and Authorities II, I, 1, 2 and 3, at pages 8 and 9 of the Brief, and as fully argued at pages 44-49.

The opinion of the Court ignores the argument at page 49 of defendant's Brief reading as follows:

> "Assume the commission of the most lewd act imaginable committed by a person in his home. If this is not seen by anyone, there of course is no crime. The broad terms of the Illinois statute, however, would convert this innocent act into a criminal one, simply by an unintended inadvertency on the part of the actor. There is no requirement in the Illinois statute requiring that the actor *intended* another person to see the act. Therefore, under the Illinois statute, a conviction could have been had under the same

> circumstances set forth in *Hearn* v. *District of Columbia,* 178 A.2d 434, 94 ALR2d 1348 heretofore referred to where a conviction was reversed in that case."

The words, "by exposing himself to others," at page 9 of the opinion do not appear in the statute.

The pertinent portions of the Illinois Statute involved read as follows: (Ill.Rev.Stat., Ch. 38, Sec. 11-9(a)(3) and (b).)

> "(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
>
> * * *
>
> "(3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person;...
>
> * * *
>
> "(b) 'Public Place' for purposes of this Section means any place where the conduct may reasonable be excepted to be viewed by others."

Where are these words of *intent* to expose himself to others? They are not here.

The term "exposure of the body" does not require proof that the accused intended to be seen by other persons. It simply requires proof that a particular part of the body of the accused was uncovered.

The statute as written would be satisfied even if the accused did not know that another person was within sight.

The statute would likewise be satified even though the evidence disclosed that the person in the presence of the accused was blind.

The statute as written would be satisfied by proof an exposure occurred, not in a place where the accused *knew* he would be

seen, but by the mere proof that at the *place* of the exposure, the accused *might be seen* through an unintended inadvertency.

The Court cannot cure the statutory deficiency by assuming the words, "intent to be seen," are there, nor can the Court supply this additional provision by referring to the words of the information, as was done at pages 1 and 2 of the opinion.

The Court overlooks its holding in *People* v. *Klick,* 66 Ill.2d 269, 362 N.E.2d 329, 5 Ill.Dec. 858, cited and discussed in defendant's Brief, pages 27 and 28. At page 860 of the *Klick* decision, it is stated:

> "...The State, however, urges that implicit in this section is the requirement that the call be made in an unreasonable manner. To adopt the State's position, it would be necessary to supply an additional provision to the otherwise clear and unambiguous language of section 26-1(a)(2). This we cannot do. *People* v. *Flaherty* (1947), 396 Ill. 304, 312-13, 71 N.E.2d 779."

Therefore, in the instant case, the Court should refuse to supply the omitted requirement of *intent* to be seen by other *persons.* To supply it would violate Article Two, Section 1, Constitution of Illinois, 1970, Separation of Powers, which reads:

> "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

As stated in *Droste* v. *Kerner,* 34 Ill. 504:

> "...We will not and can not inject provisions not found in a statute,..."

and in *Chicago Land Agencies* v. *Palmer,* 364 Ill. 13, 17:

> "For the court to undertake by judicial construction to supply omissions and cure defects in those matters which are within the legislative sphere would be violative of article 3 of our Constitution."

As stated in the dissenting opinion of *Talsky* v. *Department of Registration & Education* (1977), 68 Ill.2d 579, 370 N.E.2d 173, 12 Ill.Dec. 550 at 565, which case is cited at page 4 of the Court's opinion:

> "We are obliged to adjudicate the constitutionality of section...as it is written, not as it might be rewritten by this Court..."

and

> "...we usurp the legislative function in, in effect, rewriting a statute."

It is clear that the Legislature could not retroactively cure this legislative omission. *Dworak* v. *Tempel,* 17 Ill.2d 181, 187-188; 161 N.E.2d 258. Such would clearly violate the Fourteenth Amendment to the Constitution of the United States. *State* v. *A/S Nye Kristianborg,* 84 F.Supp. 775, 780. See also *Booth* v. *Cebula,* 25 Ill.App.2d 411, 414-415, 166 N.E.2d 618.

Inasmuch as the Legislature is so prohibited, then neither can this Court read into the statute such a non-existent provision to be applied retroactively. Such judicial action would, as stated by the United States Supreme Court in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U.S. 673, 59 S.Ct. 451, 74 L.Ed. 1107, at page 1113, transgress the due process clause of the 14th Amendment inasmuch as, "*The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.*"

Also, as stated in *Bouie* v. *Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, at pages 899-900:

> "...If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

The insertion of this missing statutory element of intent to be seen therefore deprives defendant of his right to due process under the 14th Amendment to the United States Constitution.

II.

The opinion of the Court misapprehends the effect, extent and applicability of the overbreadth doctrine. The Court, at page 3, states:

> "The argument that the statute is overbroad rests on the premise that the statute may allow criminal prosecution in some situations in which the activities of a hypothetical defendant fall within areas protected by the right of privacy and the first amendment right of expression. In regard to the privacy argument, we need not decide whether that premise is accurate; the overbreadth doctrine does not apply to privacy rights....
>
> "As a general rule a defendant may not avoid his prosecution because a similar prosecution of other individuals under the same statute might violate their constitutional rights.... The overbreadth doctrine is an exception to this rule. It allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the first amendment, even though those rights do not protect the activities of the defendant...."

At page 4, the opinion states:

> "...Unlike the actions with which the defendant is charged here, and unlike expressive and associational activities which generally occur in public, the activities which are protected by the right of privacy are by their nature generally unknown to prosecutors and therefore are not easily inhibited by official action. We do not believe that privacy rights require the protection of an overbreadth

doctrine to secure their free exercise, and we consequently decline to allow one whose personal right of privacy has not been violated to assert the hypothetical rights of others....

"Although the overbreadth doctrine does apply when first amendment expressive rights are implicated, we reject the premise of defendant's first amendment overbreadth argument in regard to this statute: that the statute on its face infringes protected expressive rights. The defendant's argument has a certain surface appeal. The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment. Since the statute does not contain obscenity standards acceptable under *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, its validity would be highly suspect if it were applied to activities which implicate first amendment rights...."

The effect of this holding is to announce the unsound doctrine that if an actor on a public stage was prosecuted under the provisions of this statute, its validity would be highly suspect, yet, as to an actor in a private home performing the same acts, the statute would be constitutional.

How can it be said with any degree of rationality that expressive rights rate higher than privacy rights on the totem pole of human rights? When we seek to protect human rights, we cannot artificially classify them in a pecking order that fails to accord the right of privacy at least equal status with the right to free expression. True it is that free speech is a hallmark of this society; but, it is likewise true that the right of privacy is its coequal as a hallmark of this society.

Search the history of the world, and no rights are more essential to freedom of man than these twin towers of constitutional liberty.

No rational case can be made for the proposition that a litigant can, through the application of the overbreadth doctrine, mount a constitutional attack against a criminal statute which infringes on protected expressive rights, whereas a litigant is prohibited from mounting such a constitutional attack on a criminal statute which infringes on privacy rights.

This question of the overbreadth doctrine application is fundamental. It is not a doctrine to be narrowly limited in application to the singular rights of free speech, nor does the opinion of the Court cite any United States Supreme Court case to that effect. It must be broadly applied to encompass the Right of Privacy which is co-equal to First Amendment Rights, as did the Court in *Attwood* v. *Purcell,* 402 F.Supp. 231.

The Court's opinion acknowledges at page 4, "The defendant's argument has a certain surface appeal." We submit it is more than that. The argument is fundamental and basic. It is solidly based on the common sense proposition that a criminal statute, whether dealing with First Amendment rights or Privacy Rights, must meet the same test of constitutionality, and that any accused charged under the terms of the statute may mount an attack on the statute in the same manner and to the same extent, whether the statute involves First Amendment rights or Privacy rights. A criminal statute which cuts across the face of the Bill of Rights, as does this one, should not stand and should be struck down on behest of anyone, who in his own house, is prosecuted under its terms.

This case came to the Supreme Court on an appeal by the State—not the defendant. The Brief filed by the State did not address this fundamental question of the overbreadth doctrine.

The question limiting its effect was first raised by the Court in its Opinion. If the State had included such argument in its Brief, defendant would have had the right to orally argue the Point. Therefore, in fairness to defendant, oral argument should be permitted on the Court's own Motion under Supreme Court Rule 367.

The cases referred to in the Court's Opinion on the overbreadth doctrine are not in point on the question involved herein as a reading of such reflects. None of them involved the type of legislative defects as did the Arizona statute struck down by the Court in *Attwood* v. *Purcell,* 402 F.Supp. 231, and the Illinois Statute struck down by the trial court in the instant case.

If the present state of the law of Illinois has not yet been applied to protect privacy rights under the overbreadth doctrine, the time has come for this Court to pronounce this needed application of the doctrine.

Nothing in the Constitution nor in the pronouncements by the United States Supreme Court suggests that privacy rights should not receive such protection in the situation presented in this case.

The artificial distinction in applying the overbreadth doctrine in Fist Amendment cases and not in Privacy Right cases has no rational, reasonable or relevant basis.

The Court's rejection of *Attwood* v. *Purcell,* D. Arizona, 1975, 402 F.Supp. 231, as being of "questionable validity" misapprehends the significance of the opinion. The Court overlooks the analysis of this opinion, which is a case squarely on point as stated in defendant's Brief at pages 25, 26. There, the Three Judge Court applied the overbreadth doctrine in holding the Arizona statute, almost identical to the one in Illinois, unconstitutional. There is no logical reason why the same result should not follow in this case.

III.

The Court's opinion misapprehends the defendant's equal protection argument and the effect of *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607. It fails to recognize that the *Miller* case must have application to the Public Indecency Act, Chapter 38, Sec. 11-9, Illinois Revised

Statutes, for the same reason that it must have application to the statute on "obscenity", Chapter 38, Sec. 11-20, Illinois Revised Statutes. The Court's opinion overlooked the argument of defendant set forth in Points and Authorities II, D, 1, 2, 3, and also ignores the argument set forth at pages 26-33 of defendant's Brief.

At page 32 of the defendant's Brief, it is stated:

> "...The distinction between a person who is charged with obscenely exhibiting the body for gain and a person who is charged with a lewd exposure of the body is a distinction without a difference. There can be no legitimate state interest promoted by such a classification. Why should a person who does not receive gain have his liberty placed in any more jeopardy than the person charged with doing the same act for gain? How could any legitimate state interest be promoted by such a classification? Why are obscene exhibitions to be placed in a more protected state than lewd exposures? Certainly, the fundamental liberties of persons should not depend on semantics—the choice of the word 'lewd' as compared to the choice of the word 'obscene.' The State should have an interest in striking down such an arbitrary classification rather than to construct one such as this. There is no doubt that fundamental personal rights are endangered by such a classificaiton that permits prosecutors and juries to roam at will in concluding a particular act to be lewd with no legislative guidelines to confine them in charging and convicting, whereas the same act at the same time would by reason of the guidelines set forth in the obscenity statute, as required by the United States Supreme Court, be held not obscene as a matter of law."

The Court, in its opinion at pages 4 and 5, states:

> "Since the statute does not contain obscenity standards acceptable under *Miller* v. *California* (1973), 413 U.S. 15,

> 37 L.Ed.2d 419, 93 S.Ct. 2607, its validity would be highly suspect if it were applied to activities which implicate first amendment rights...."

The Court misapprehends the significance of this distinction without a difference as heretofore stated. Whether the Illinois Public Indecency Act applies to First Amendment rights or not, prosecution and conviction should not rest on such a dubious distinction. If the statute is "highly suspect" when applied to activities involving First Amendment Rights, certainly it is as "highly suspect" when applied to the equally important question of rights of Privacy in a home.

The Court's opinion states at pages 5 and 6 with reference to a comparison between the Illinois Obscenity Act and the Illinois Public Indecency Act as follows:

> "This statute (obscenity statute), which also includes a definition of 'obscenity,' has been upheld on the basis that it incorporates the *Miller* standards....
>
> "In contrast,, section 11-9, as we view it, is aimed at public displays which do not involve first amendment rights. Such displays may be prohibited without reference to the constitutional obscenity standard, because they do not involve primarily expressive activities...."

The Court here misapprehended the thrust of the defendant's argument. No standard involving the application of constitutional principles should be based on the irrational and artifical distinction that if a person intending to be seen performs acts on a public stage, he may be protected from such an overbroad, vague and standardless statute, whereas if he is in the privacy of his home and inadvertently seen by peeping toms or others, he has no constitutional protection against vagueness and overbreadth. To say that a man on a stage has a higher standing than a man in his own private home is to construct a standard that bears no resemblance to either rationality or justice. This is why

Attwood v. *Purcell* (D Arizona 1975), 402 F.Supp. 231, is the key to be followed, irrespective of whether a person being charged is on a public stage or in the privacy of his own home. This Court, in its opinion at page 3, misapprehends the effect of this clearcut holding of a three judge panel on the validity of the Illinois Public Indecency Statute, which is, for all practical purposes, identical to that of the Arizona statute struck down in that case. The *Attwood* Court clearly recognized the danger to privacy rights in the home. The Court stated at page 236:

> "..Of course such a state regulation literally applied in the privacy of one's home would be highly suspect if not unconstitutional per se...."

The Court also stated:

> "...The statute itself uses such broad and sweeping language that only radical surgery could save it...."

By its decision, the statute was struck down on the basis that the statute was unconstitutional "due to its vagueness and overbreadth." That is precisely what should be done to the Illinois Public Indecency Statute.

The Court, in its Opinion at page 9, stated:

> "The defendant's equal protection argument is equally unmeritorious...."

No reason is given for such conclusion other than the statement at page 10 of the Opinion which states as follows:

> "The purpose of the standards in the obscenity statute is to protect first amendment rights...."

Whether either of these statutes or both involve first amendment rights is not the answer in determining whether the classification "bears some rational relationship to a legitimate state purpose."

The significant question to ask is: "What legitimate state interest does the classification promote?" *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L.Ed.2d 768, 771.

The answer is clear. No legitimate state interest exists in permitting prosecutors, Judges and juries to prosecute and convict on such a selective basis that gives preference to those who perform for gain on a stage intending to be seen, over those who remain at home and who may be seen through an unintended inadvertency.

No invocation of the code words, "First amendment rights," can cloak such an irrational classification with legitimacy. The mere fact that *Ward* v. *Illinois* (1977), 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085, upheld the obscenity statute is no answer to the defendant's equal protection argument inasmuch as neither the Equal Protection argument nor the Illinois Public Indecency statute was considered in that case.

The instant case is the first case in which the constitutionality of the Public Indecency Statute has been raised.

The Court also overlooked defendant's argument at pages 38 and 39 of defendant's Brief:

> "...this statute, as originally drafted, contained the following language:
>
> > 'A lewd exposure of the body done with intent to arouse or satisfy the sexual desire of the person or of those to whom such exposure is made or both.' Smith-Hurd Illinois Annotated Statutes, Chapter 38, Section 11-9, Committee Comments, page 433.
>
> "However, as stated in the Comments:
>
> > '...reference to an intent to stimulate the viewer of the lewd act was deleted.'

> "With this deletion, the statute assumed its peculiar aim to punish a person for intending to affect no one but himself, while the same act done at the same time and in the same place by another but done with no such intent is no crime at all."

Therefore, under the provisions of this statute as written, we find the unusual statutory classification of punishing a person for intending to affect no one but himself, whereas the same act by another person intending to shock or stimulate another person, *but not himself,* goes unpunished.

Such a strange statutory classification cannot possibly promote a legitimate state interest.

The Equal Protection argument of defendant is sound and the statute should fall.

IV.

The Court misapprehends the Due Process Doctrine of vagueness under the Fourteenth Amendment to the United States Constitution when it states at pages 6 and 7 of the opinion:

> "...Finally, if the statute implicates first amendment expressive rights, it must not be so vague as to chill their free exercise.... The last element need not concern us since, as we noted above, the statute at issue in this case does not impinge on first amendment rights."

The opinion overlooks the fact that a statute likewise "must not be so vague as to chill" the free exercise of rights of Privacy in a person's own home. This is as vital a right to protect as is the First Amendment expressive right. In this connection, the Court overlooked defendant's Brief, Points and Authorities II, A, B and pages 22-28 and 33-40.

A statute is just as vague when applied to a person whose privacy rights are involved as when applied to a person whose first amendment rights are involved. To say that one can *not* be prosecuted under a vague statute and the other can be prosecuted under the same vague statute is a holding that cannot stand under the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

The Court's opinion at page 4 attempts to draw a distinction between First Amendment Rights and Privacy Rights, stating that, "The activities which are protected by the right of privacy are by their nature generally unknown to prosecutors and therefore are not easily inhibited by official action..." This, we respectfully submit, is an incorrect assumption. What more chilling effect can there be than to place a person in his own home under jeopardy of prosecution for an exposure that was not intended to be seen? No one can rest secure that an overzealous prosecutor indulging in selective prosecution for whatever political or other reason will not single out a target under such a vague, broad, puzzling and peculiar statute which is designed to punish a person for intending to affect no one but himself.

Although the Court, at page 2 of its opinion, recognizes defendant's reliance on *Stanley* v. *Georgia* (1969), 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243, the Court's opinion overlooks and misapprehends the effect of this opinion as set forth at pages 40-45 of defendant's Brief, the conclusion of which reads as follows:

> "It is no more objectionable for a person to *perform* an act, whether lewd or not, in his own home than to *view* them as in the case of *Stanley* v. *Georgia*. Suppose the Georgia statute had included a clause making it illegal to possess obscene materials in a home which might 'reasonably be expected to be viewed by others' who might see fit to look into a private home. The United States

Supreme Court would have struck down such an addition to the Georgia statute since it would have resulted in an attempt to punish criminally and deprive a person of his liberty for committing only a negligenct act in his own home with no intent to affect anyone but himself.

"Appellant overlooks this factor when attempting to avoid the effect of the *Stanley* v. *Georgia* holding."

No one should be held to the position of a guarantor that a person on the outside of the home will not look into the home.

The Court's opinion states at page 7:

"...A defendant therefore may be prosecuted under a statute without violating his due process rights if his conduct clearly falls within the statutory proscription even though the statute may be vague as to other conduct...."

This is a misapprehension in that it leaves to the prosecutor, the jury and the Judge the determination of what is and what is not conduct that falls outside the scope of the statute due to its vagueness as distinguished from conduct which would come under the statute as not being barred by vagueness of the statute. This flies precisely in the face of the United States Supreme Court's decision in *Smith* v. *Goguen* (1974), 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242, the flag misuse case quoted at pages 33-34 of defendant's Brief. This United States Supreme Court opinion is particularly applicable to the Due Process Doctrine of vagueness involved herein. The Court states at page 609:

"...In upholding Goguen's void-for-vagueness contentions, the court concluded that the words 'treat contemptuously' did not provide a 'readily ascertainable standard of guilt.' Id., at 167....

* * *

"We agree with the holdings of the District Court and the Court of Appeals on the due process doctrine of

> vagueness.... Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' "

and at page 613:

> "...Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.... Mr. Justice Black...voiced a concern which we share, against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' ...Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process."

If the term "treats contemptuously" the flag of the United States if vague, then certainly the United States Supreme Court would agree with *Attwood* v. *Purcell,* 402 F.Supp. 231, that "lewd" exposure of the body is likewise unconstitutionally vague.

The Court, at page 9 of the opinion, states:

> "...The information charged the defendant with exposing his sex organ, conduct which clearly constiutes a lewd exposure, and he may not pose hypothetical situations in which the statutory standards might conceivably be unconstitutionally vague...."

The Court misapprehends and overlooks the fact that no one can be charged with an alleged crime under a statute's unconstitutional terms, regardless of what is set forth in the Information. The statute should contain the necessary elements of the crime before any charge is made. Therefore, whatever the Information states was exposed is immaterial to the determination of whether or not the statute violates the vagueness doc-

trine of the Due Process Clause under the Fourteenth Amendment to the United States Constitution.

The Court, in its opinion, erroneously holds that exposure of a man's sex organ in his own house is per se a "lewd exposure of the body". This completely overlooks the obvious fact that such an organ is exposed in the house several times each day.

The statute is silent as to what the accused must do with regard to the exposed organ that will render the exposure "lewd" rather than normal or acceptable.

The fact it is seen by others does not change the character of the exposure from normal to "lewd", especially in the absence of a statutory requirement that the accused intended to be seen by others.

Therefore, without any statutory guidelines based on *Miller* standards, the statute falls into the vagueness catagory with regard to the charge in the information itself, which charge is limited in its description to the mere exposure of the sex organ, which is no crime. The conclusionary words of the information that the exposure was done "in a lewd manner" is no less vague than the statutory term "lewd exposure of the body." Thus, defendant's Fourteenth Amendment rights are directly affected by the vague, standardless statutory term "lewd exposure" and by the allegation "lewd manner" in the Information.

It is no answer to say that the vagueness of the term "lewd exposure" is saved by the requirement that the exposure must be done with "intent to arouse or to satisfy the sexual desire of the person" charged.

The presence or absence of intent to arouse the actor does not make the exposure lewd or not lewd. The provision concerning "intent to arouse" has nothing to do with describing what was done. It has to do solely with the subjective intent of the accused in doing whatever he did.

This provision likewise is vague and standardless.

The Court overlooked defendant's position on this provision as set forth in the defendant's Brief at pages 35-59:

> "Also, the provisions of the statute: 'A lewd exposure of the body done with intent to arouse or satisfy the sexual desire of the person' is likewise vague and overbroad. What standard is the jury required to use in this key element of the crime? Again, it is an abdication of legislative direction. Search the bounds of the statute for the guideline—it is not there.
>
> * * *
>
> "...The statutory language is broad enough to encourage selective prosection and to permit conflicting verdicts to stand...in identical cases since there is no limitation in the statute that requires the jury to apply a 'normal average person' test, or any other test, in determining intent of the actor. Thus, speculation, guess, conjecture, surmise and personal predilection of each juror is encouraged rather than proscribed by this standardless example of defective statutory draftsmanship."

There is another unusual aspect concerning the statute's focus on the actor rather than the viewer. The classic public indecency statute was designed to protect the public against shocking displays. This present Illinois statute, however, affords no protection to the public from such displays. Under the terms of this statute, a man or woman can perform the most lewd act imaginable on a public road in view of a hundred people with impunity. It is only when the prosecution proves beyond a reasonable doubt that the lewd act was done 'with intent to arouse' the actor, not the viewer, that such lewd exposure becomes a crime. This puzzling, peculiar statute is a complete departure from the traditional crime of public indecency.

When these vague and standardless provisions, along with the inherent danger of selective prosecution, are considered in the light of such a peculiar, narrow and irrational statutory aim, the statute cannot possibly meet the standard of either due process or equal protection.

V.

On the question of "Public Place", the Court's opinion at pages 7 and 8 pertaining to the statutory definition of "public place" states, "We believe that the Legislature clearly intended to use the word 'expected.' "

The cases referred to by the Court at page 8 of the opinion pertaining to statutory construction do not involve penal statutes, and therefore, the Court misapprehends the rule governing it on construing this statute. Penal statutes are to be construed strictly in favor of an accused, not against him. *People* v. *Lutz,* 73 Ill.2d 204, 383 N.E.2d 171, 22 Ill. Dec. 695, 698; *Viereck* v. *United States,* 318 U.S. 236, 87 L.Ed. 734, 739; *Sarlls* v. *United States,* 152 U.S. 571, 38 L.Ed. 556, 558; *United States* v. *Chase,* 135 U.S. 255, 34 L.Ed.2d 117, 120; and *United States* v. *Wiltberger,* 18 U.S. 5 Wheat. 95, 96, wherein Chief Justice Marshall observed the obvious, namely, "[i]s is the Legislature, not the Court, which is to define a crime."

The Court overlooks defendant's Brief wherein it is stated at page 53 as follows:

> "The Illinois Revised Statutes of 1973, 1975 and 1977 all contain this language, and no legislative enactment has, during those years, sought to change the word 'excepted'.
>
> "The Smith-Hurd statutory compilers' note, 'Probably should read expected.' has not changed the statute. Statutory compilers have no power to change statutes. They have no authority to speculate on the legislature's intent to use another word. When the word is a perfectly

spelled word of known meaning, it must be accepted as that word."

The Court also overlooked the defendant's Brief at pages 52-58 on this point, and, in particular, at pages 52 and 53:

> "Any ordinary intelligent person reading Chapter 38, Section 11-9(a) would understand that the acts prohibited by the statute are only prohibited in a *public* place, not a *private* place. The reader would have every reason to assume that the act of sexual intercourse listed in the statute in clause (a)(2) was not decreed to be a crime when done in a private place rather than a public place. The same would apply to the other list of acts, including 'a lewd exposure of the body....' (Clause (a)(3)).
>
> * * *
>
> "...what does clause (b) of the statute mean and what is its effect?
>
> "To begin with, if this clause is held to mean that an act of either sexual intercourse or lewd exposure of the body is a crime when committed *in a private home,* then the clause has completely changed the meaning of the rest of the statute inasmuch as every word prior to clause (b) points squarely to a legislative intent that the act had to occur *in a public place and not a private place* for there to be violation of the statute."

and at page 57:

> "...any attempt to rewrite the statute by substituting the word 'expected' would result in changing a perfectly simple, well-known term 'public place' to something no reasonable man would expect the statute to mean....
>
> "In order to avoid such result, the Court would need to take the further step and construe the clause to read 'public place...means any *public* place where the conduct may

reasonably be expected to be viewed by others.' Even with such a construction, however, the statute cannot stand in view of the other defects herein referred to."

Conclusion

In conclusion, defendant respectfully prays that this Court order a Rehearing of the decision and opinion of this Court filed September 29, 1980, and to permit oral argument in support of this Petition. There are multiple constitutional issues raised that should receive the reconsideration of this Court, and particularly in view of the fact that the Brief filed by appellant did not address issues that were, for the first time, raised in the opinion of this Court, which this defendant had no reasonable opportunity to answer until after the opinion was rendered.

Respectfully submitted,

JAMES B. WHAM
WHAM & WHAM
212 East Broadway
Centralia, Illinois 62801
(618) 532-5621

Attorneys for Defendant-Appellee, Gary "Mike" Garrison

APPENDIX F

Order of Supreme Court of Illinois Denying Petition for Rehearing entered on the 26th day of November, 1980.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

November 26, 1980

Mr. James B. Wham
Attorney at Law
212 E. Broadway
Centralia, IL 62801

No. 52750 - People State of Illinois, appellant, vs. Gary "Mike" Garrison, appellee, Appeal, Circuit Court (Marion).

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX G

Notice of Appeal to the Supreme Court of the United States filed December 24, 1980, in the Office of the Clerk of the Illinois Supreme Court.

NO. 52750

IN THE

SUPREME COURT OF ILLINOIS

People Of The State Of Illinois,
Plaintiff-Appellant,

vs.

Gary "Mike" Garrison,
Defendant-Appellee.

Original Appeal From The Circuit
Court of the Fourt Judicial
Circuit, Marion County, Illinois

NOS. 78-CM-180 and 78-CM-400

Honorable Harry L. Ziegler
Judge presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Gary "Mike" Garrison, appellee herein, hereby appeals to the United States Supreme Court from the Judgment and Opinion of the Supreme Court of Illinois dated September 29, 1980, and from the Order of said Court entered November 26, 1980, denying the Petition for Rehearing of the Court's Judgment and Opinion of September 29, 1980, which Petition for Rehearing was timely filed on the 17th day of October, 1980.

2. This appeal is taken pursuant to 28 U.S.C., Section 1257(2) and in the alternative, through a Petition for Certiorari pursuant to 28 U.S.C. Section 2103.

JAMES B. WHAM
WHAM & WHAM
212 East Broadway
P.O. Box 549
Centralia, Illinois 62801
(618) 532-5621

Counsel for Appellee, Gary "Mike" Garrison

Proof Of Service Of Notice Of Appeal To The Supreme Court Of The United States

I, the undersigned, James B. Wham, member of the firm of Wham & Wham Attorneys, counsel for Gary "Mike" Garrison, do hereby certify that on the 23rd day of December, 1980, I served a copy of the Notice of Appeal to the Supreme Court of the United States, on each of the following named persons:

Mr. David Cassorla
Assistant Attorney General
State of Illinois
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601

Mr. Frank B. Schweitzer
Attorney at Law
503 West Market Street
Taylorville, Illinois 62568

by depositing said Notice of Appeal in an envelope, legibly addressed to the aforesaid attorneys, proper postage fully prepaid, in the United States Mail at the Post Office in Centralia, Illinois.

/s/ James B. Wham

Subscribed and sworn to before me this 23rd day of December, 1980.

/s/ Kathy Sue Griffin
Notary Public

APPENDIX H

Motion attacking original Information filed:

MOTION

Now comes the defendant, Gary "Mike" Garrison, by Wham & Wham, his attorneys, and moves the Court to dismiss the above Information and each and every Count thereof for one or more of the following reasons:

I.

1. The statute upon which the Information and each Count thereof is based, being Chapter 38, Section 11-9(a)(3) and (b), Illinois Revised Statutes, 1977 State Bar Association Edition, is overbroad, vague and is not sufficiently explicit to inform the defendant what conduct on his part will render him liable to its penalties, and said statute violates the basic principles that a criminal statute must give fair warning of the conduct which it makes a crime, and therefore, defendant will be deprived of due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution,...in the event he is tried on the Information filed herein. Consequently the Information and each Count thereof should be dismissed....

* * * * *

NOTE: This Motion attacking the original Information filed continues on for 23 paragraphs and raises the same Federal questions as those raised in the Motions attacking the Amended Informations, the pertinent portions of which are set forth in Appendix I.

APPENDIX I

Pertinent portions of Motions filed by defendant Garrison (Appellant here), attacking the Illinois Public Indecency Statute in each of the two cases filed against him in the Circuit Court of Marion County, Illinois, being Cases 78-CM-180 and 78-CM-400.

IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT

MARION COUNTY, ILLINOIS

The People Of The State Of Illinois,

vs.

Gary "Mike" Garrison,
Defendant.

No. 78-CM-180 &
No. 78-CM-400

MOTION

Now comes the defendant, Gary "Mike" Garrison, by Wham & Wham, his attorneys, and moves the Court to dismiss the Information filed herein and each and every Count therein for one or more of the following reasons:

I.

1. The Statute upon which the Information and each Count thereof is based, being Chapter 38, Section 11-9(a)(3) and (b), Illinois Revised Statutes, 1977 State Bar Association Edition, is overbroad, vague and is not sufficiently explicit to inform the defendant what conduct on his part will render him liable to its penalties, and said statute violates the basic principles that a criminal statute must give fair warning of the conduct which it makes a crime, and therefore, defendant will be deprived of due process and equal protection of the laws under the Fourteenth

Amendment to the United States Constitution, and under Sections 2 and 8 of Artricle I of the Constitution of the State of Illinois in the event he is tried on the Information filed herein. Consequently, the Information and each Count thereof should be dismissed.

2. The statute upon which the Information and each Count thereof is based, being Chapter 38, Section 11-9(a)(3) and (b), Illinois Revised Statutes, 1977 State Bar Association Edition, is invalid as an unconstitutional invasion of the right of privacy of persons charged thereunder by reason of the First, Third, Fourth, Fifth, Sixth and Ninth Amendments made applicable to the States through the Fourteenth Amendment to the Constitution of the United States. Consequently, the Information and each Count thereof should be dismissed.

* * *

4. Paragraph (a)(3) of Section 11-9, Chapter 38, Illinois Revised Statutes, 1977 State Bar Association Edition, upon which the Information and each Count thereof is based, prescribes as an element of the offense of public indecency "a lewd exposure of the body". Such terminology is so vague and indefinite and uncertain that persons of common intelligence would be required to guess at the meaning of such terminology so that a deprivation of the right of fair warning results, and the statute is therefore not sufficiently explicit to inform those who are subject to it of what conduct on their part would render them liable to its penalties. Consequently, defendant will be deprived of due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution, . . . in the event he is tried on the Information filed herein. Therefore, the Information and each Count thereof should be dismissed.

5. Paragraph (a)(3) of Section 11-9, Chapter 38, Illinois Revised Statutes, 1977 State Bar Association Edition, upon which the Information and each Count thereof is based,

prescribes as an element of the offense of public indecency "a lewd exposure of the body done with intent to arouse or to satisfy the sexual desires of the person." Such terminology is so vague and indefinite and uncertain that persons of common intelligence would be required to guess at the meaning of such terminology so that a deprivation of the right of fair warning results and the statute is therefore not sufficiently explicit to inform those who are subject to it of what conduct on their part would render them liable under its penalties. Further it is so vague and indefinite and uncertain and overbroad and no standard is set forth describing as a requirement that "hard core" sexual conduct specifically defined is an element of the offense, nor is there any requirement that the actor intended to be seen by others, nor is there a sufficient standard governing courts and juries in determining whether the actor intended "to arouse or to satisfy the sexual desire" of the actor, nor is there any requirement that the persons viewing any exposure of the body be affected physically, mentally or emotionally in any way, nor is there even any requirement that the exposure of the body be seen by any person. Therefore, the terms of said statute are so overbroad and vague as to leave the courts and juries to their own devices in concluding by speculation, guess and surmise whether the exposure of the body was "lewd", whether the exposure was "done with intent to arouse or to satisfy the sexual desire of the person". Further, a defendant could be convicted, even though he or she did not intend to be seen and even though the viewer was not affected physically, mentally or emotionally, and even though the act of exposure was done with the express consent of the viewer. Therefore, such statute is invalid under the Fourteenth Amendment to the United States Constitution, . . . Consequently, the Information and each Count thereof should be dismissed.

6. Paragraph (b) of Section 11-9, Chapter 38, Illinois Revised Statutes, 1977 State Bar Association Edition, is invalid as an unconstitutional invasion of the right of privacy and is overbroad and vague in its definition of "public place" in that its scope of

enforcement is unlimited as to place. The definition of public place is so broad as to violate the constitutional right of privacy in the home for an act of exposure done therein, even though not intended to be viewed by others. The statute does not require scienter. The only requirement set forth in said statute pertaining to intent is in paragraph (3) which pertains solely to the "intent to arouse or to satisfy the sexual desire of the person". Such intent does not satisfy constitutional standards requiring scienter or intent that the alleged exposure be viewed by other persons. The words "where the conduct may reasonably be excepted to be viewed by others" does not require intent that the conduct be so viewed, and therefore is overbroad in its scope. Consequently, the statute violates the right of privacy guaranteed by the Bill of Rights, as made applicable to the States by the Fourteenth Amendment to the United States Constitution. Therefore, the Information and each Count thereof should be dismissed.

* * *

8. Paragraph (a)(3) and (b) of Section 11-9, Chapter 38, Illinois Revised Statutes, 1977 State Bar Association Edition, is invalid as an unconstitutional invasion of the right of privacy and is overbroad and vague in its definition of "public place" and violates the inherent rights of husband and wife in that its scope of enforcement is unlimited as to place. The definition of public place is so broad as to violate the constitutional right of privacy in the home for an act of exposure, even though not intended to be viewed by others. The statute does not require scienter. The only requirement set forth in said statute pertaining to intent is in paragraph (3) which pertains solely to the "intent to arouse or satisfy the sexual desire of the person". Such intent does not satisfy constitutional standards requiring scienter or intent that the alleged exposure be viewed by other persons than the spouse. The words "where the conduct may reasonably be excepted to be viewed by others" does not require intent that the conduct be so viewed. The statute does not even

require that the conduct be viewed by anyone other than the spouse of the person so committing the act of exposure, and therefore is overbroad in its scope and strikes at the basic rights of husband and wife, without any limitation of the type of conduct which would be made a crime and gives no fair warning as to what act of exposure is "lewd" so as to distinguish the usual conduct between husband and wife from that which is intended to be prohibited by law. Moreover, said statute does not even require that the act of exposure be done without the consent of the person viewing the act of exposure, nor does it require the person viewing said act to be affected physically, mentally or emotionally. Consequently, the statute is overbroad and vague and violates the right of privacy created under the Bill of Rights as made applicable to the States by the Fourteenth Amendment to the United States Constitution. Therefore, the statute referred to in the Information should be declared unconstitutional, and the Information and each Count thereof based upon said statute should be dismissed.

* * *

10. Chapter 38, Section 11-9(a)(3) and (b) is impermissibly vague and overbroad, depriving those charged under the terms thereof, including this defendant, of due process and infringing on conduct protected by the First and Fourteenth Amendments to the Constitution of the United States and makes criminal otherwise protected conduct. Consequently, the Information and each Count thereof based on said statute should be dismissed.

* * *

12. The statute is entitled "*Public* Indecency". In paragraph (a), the statute provides, "Any person . . . who performs any of the following acts in a *public* place commits *public* indecency". The last sentence of the statute, being paragraph (b) of the statute, then defines "public place" in such broad and vague terms that the place may well be the home with no other person than the actor present who through inadvertence or negligence

exposes his or her body in a room within the home where it "may reasonably be excepted to be viewed by others". Such could result from an unshaded window or screen door. Moreover, the same exposure at the same place need not even be seen by anyone on the outside of the house to come within the vague, overbroad language if the fact finders found the exposure to have been performed in such place. Likewise, the language requires no intent on the part of the actor to be seen by persons on the outside of the home, nor does such language require a showing of any effect on the viewer, physically, and mentally or emotionally, if viewed. Thus, the definition of "public place", read in context with the rest of the statutory terms converts the "lewd exposure" into other than a crime against the public but rather proscribes an act of exposure if the actor only intends to arouse the actor and not the viewer, and this is a place that is not public within the usual meaning of the term "public place". Thus, any reasonable person reading the title to the act "Public Indecency" would not be put on notice that the statute, in addition to proscribing an exposure performed in a public place where the actor intends to be seen by others, also encompasses an exposure done in a private place where the actor does not intend to be seen by others but where the act may be viewed only through inadvertence or negligence. Consequently, the said statute is vague in that it does not give fair warning of the acts and places of the acts it prohibits it attempts to make a crime. In addition, the statute is overbroad and violates the right to privacy. Thus, the right to due process under the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Illinois Constitution of anyone charged thereunder is violated, as well as the right of privacy guaranteed by the First, Third, Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States, . . . Therefore, the Information filed herein and each Count thereof based upon this statute should be dismissed.

13. Paragraph (b) of Chapter 38, Section 11-9, is not understandable and does not advise persons charged under the

terms of said statute what the "public place" means as defined by the statute. Therefore, paragraph (b) should be declared unconstitutional under the Fourteenth Amendment to the United States Constitution . . . in that no reasonable person can be certain of what the Legislature meant by the phrase "excepted to be viewed by others". Therefore, the Information and each Count thereof should be dismissed.

14. Nowhere in the statute, being Chapter 38, Section 11-9, is there any requirement that the exposure of the body be seen by anyone. Therefore, the statute, violates the right of privacy guaranteed by the Bill of Rights, as made applicable to the States by the Fourteenth Amendment to the United States Constitution. Consequently, the Information and each Count thereof should be dismissed as failing to charge defendant with any criminal act.

* * *

16. The Statute upon which the Information and each Count thereof is based, being Chapter 38, Section 11-9(a)(3) and (b) Illinois Revised Statutes, 1977 State Bar Association Edition, is entitled *Public Indecency* which Statute reads as follows: "(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency: (3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person; . . . (b) "Public Place' for purposes of this Section means any place where the conduct may reasonably be excepted to be viewed by others. (c) Sentence. Public indecency is a Class A misdemeanor."

A person convicted of public indecency shall be fined not more than $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year or both.

This Statute is in the same Criminal Code of 1961 as is the *Obscenity Statute,* being Chapter 38, Section 11-20, the pertinent portions of which read as follows:

"(a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, . . . he: (4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; . . . (b) Obscene Defined. A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . . (c) Interpretation of Evidence. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sale of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show: (1) The character of the audience for which the material was designed or to which it was directed; (2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people; (3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof; (4) The degree, if any, of public acceptance of the material in this State; (5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; (6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence. Obscenity is a Class A misdemenaor. A second or subsequent offense is a Class 4 felony . . . .

(f) Affirmative Defenses. It shall be an affirmative defense to obscenity that the dissemination: (1) Was not for gain and was made to personal associates other than children under 18 years of age; (2) Was to institutions or individuals having scientific or other special justification for possession of such material."

A person charged under the Public Indecency Act is denied equal protection of the law and due process under the Fourteenth Amendment to the United States Constitution and under Article I Section 2 of the Illinois Constitution for the following reasons:

(a) Both the Public Indecency Statute and the Obscenity Statute hereinabove referred to are contained in the Illinois Criminal Code of 1961.

(b) The Obscenity Act governs prosecution of persons who exhibit their bodies for gain, whereas the Public Indecency Act governs prosecution of all persons who expose their bodies whether for gain or not.

(c) The right to equal protection of the law is violated by Statutes which create arbitrary unreasonable classifications that permit the punishment of one person and not another for the commission of the identical act in the same place and at the same time, and when the persons are of the same age and mental capacity.

(d) A person charged under the Obscenity Statute with performing an obscene act or an obscene exhibition of his body, is afforded notice of what the Legislature meant by the word "obscene" inasmuch as "obscene" is defined in Section (b), whereas a person charged under the Public Indecency Statute for a lewd exposure of his body is given no notice as to what the Legislature meant by the words "lewd exposure" inasmuch as it is not defined. The classification thus created by legislative enactment, therefore, treats persons charged with "obscene exhibition" of the body more favorably than persons charged with

"a lewd exposure of the body" and, therefore, said legislative enactments create an arbitrary and unreasonable classification which violates the rights of persons charged under the Public Indecency Act to equal protection of the law and due process of the law.

(e) The defenses set forth in the Obscenity Statute are not available to a person charged under the Public Exposure Statute for the same act at the same time and place. Thus a person so charged will be deprived of his right to equal protection of the law and due process on account of the arbitrary unreasonable classificaiton which resulted from the enactment of said statutes, to-wit, Public Exposure Statute and the Obscenity Statute in the 1961 Illinois Criminal Code.

(f) The person who is charged with exposing his body for gain has, by the terms of the Obscenity Statute, more rights accorded and more defenses available to him than does the person who is charged with exposing his body not for gain at the same time and place. Thus an arbitrary and unreasonable classification has been established by said statutes in which those persons coming within the latter classification are deprived of equal protection of the law and due process of the law. Consequently, the Public Indecency Statute pertaining to a charge of lewd exposure of the body should be held unconstitutional.

(g) The Obscenity Statute requires, before conviction of any person charged thereunder for exposing his body, that such exposure be of such character as to have an effect on other persons, whereas the Public Indecency Statute makes no such requirement. Thus a person charged under the terms of the Public Indecency Statute is denied equal protection of the law when compared to those charged under the Obscenity Statute. Consequently, the Public Indecency Statute as it pertains to exposure of the body, violates the constitutional rights to equal protection of the law and due process of the law of those persons so prosecuted thereunder by reason of the arbitrary unreasonable classification created by said statutes.

* * *

17. Paragraph (b) of Chapter 38, Section 11-9 is not understandable and does not advise persons charged under the terms of said statute of what "Public Place" means as defined by the statute. Therefore, paragraph (b) should be declared unconstitutional under the Fourteenth Amendment to the United States Constitution . . . in that no responsible person can be certain as to what the Legislature meant by the phrase "excepted to be viewed by others". Therefore, the Information and each Count thereof should be dismissed.

18. The Information and the statute upon which the Information and Counts are based being insufficient for one or more of the reasons hereinabove set forth, the Court has no jurisdiction and the case should be dismissed.

* * *

80-1231

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY "MIKE" GARRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS THE INSTANT APPEAL

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QUESTIONS PRESENTED

I. Whether the decision of the Illinois Supreme Court, remanding appellant's cause for further proceedings, constitutes the "finality" required by 28 U. S. C. § 1257(2).

II. Whether public indecency is a constitutionally protected right under either the First Amendment's guarantee of free speech or under the right of privacy.

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INTRODUCTION

The appellee, People of the State of Illinois, move this Court to dismiss the appeal herein on the grounds that this Court does not have jurisdiction to hear the cause and alternatively that the questions on which the decision of the cause depends are so unsubstantial as not to need review.

JURISDICTION

The jurisdictional requisite of finality as provided in 28 U. S. C. § 1257(2) is not present here. Hence the Court does not have jurisdiction to hear the case. This is discussed, *supra,* under Reasons For Dismissing The Appeal.

STATEMENT OF THE CASE

Appellee adopts appellant's statement of facts but wishes to clarify the charges. Each count in this case alleged that the defendant "while standing behind a storm door, (did) expose his sex organ in a lewd manner to (name of passerby) with intent to arouse his sexual desires."

REASONS FOR GRANTING THE MOTION TO DISMISS

I.

THIS COURT LACKS JURISDICTION TO HEAR THIS CASE AS THE FINALITY REQUIREMENT OF 28 U. S. C. § 1257(2) IS NOT MET.

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. § 1257(2). This statute permits discretionary review of state court judgments only when they are "final." 28 U. S. C. § 1257. The appellee submits that the judgment sought to be reviewed here is not a final one within the meaning of 28 U. S. C. § 1257.

In the instant case the appellant successfully argued in the trial court that certain provisions of the Illinois Public Indecency Statute, i.e., Ill. Rev. Stat., ch. 38 §§ 11-9(a)(3) and 11-9(b), were unconstitutional. The State appealed this ruling directly to the Illinois Supreme Court. That court found that the statute was constitutional and reversed the judgment of the circuit court and remanded the cause for further proceedings. Appellant's Appendix A at A-12.

Those proceedings have not yet been held. The appellant has not been tried for the acts charged and presently stands unconvicted. Instead of proceeding to trial the appellant seeks review from this Court for what he terms constitutional questions.

It is fundamental that the final judgment in a criminal proceeding is the sentence and that no appeal lies to this Court until a person is convicted and sentenced. *Parr* v. *United States,* 351 U. S. 513 (1956). This Court has refused to hear many similar criminal appeals because of this lack of finality. *See, e.g., Chapman* v. *California,* 405 U. S. 1020 (1972); *Arcenaux* v. *Louisiana,* 376 U. S. 336 (1964); *Eastman* v. *Ohio,* 299 U. S. 505 (1936). The Court should invoke this long-standing rule and dismiss this appeal because further proceedings remain to be completed in the state court.

The appellant is evidently aware of the finality rule. He argues that certain cases of this Court have created exceptions to the rule and that his case is one such exception. He relies heavily on *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975). In *Cox* this Court allowed an appeal even though there were further proceedings to be heard in the state courts. Because those state proceedings were unrelated to the federal question, this Court felt it should examine a Georgia law which created a conflict between freedom of the press and the right to privacy. The Georgia law had created a civil action wherein a newspaper could be sued for publishing the name of a rape victim.

This Court did accept jurisdiction in *Cox.* The reasons it did so are stated very well by the appellant in his jurisdictional statement at p. 7. The Court felt that should the newspaper succeed at the trial below, then the "important question of freedom of the press under the First Amendment" would go unanswered. This would only have further harmed the operation of a free press as the press would not have known how to properly report the news.

However we are not dealing here with the freedom of the press. We are dealing here with a person accused of exhibiting himself to female passersby with intent to arouse his sexual desires. The appellees find it hard to believe, as appellant posits in his jurisdictional statement at p. 7, that "the Illinois

Public Indecency Statute leaves, not merely the press, but every person in the shadow of criminal sanctions of a statute, the constitutionality of which is in serious doubt."

Cox does not stand for the proposition that the finality requirement is no longer a jurisdictional predicate. *Cox* merely states that the finality requirement is not rigid when it comes to reviewing cases that have great public importance and constitutional ramifications.

The appellant maintains that his case is important because the rights of privacy and freedom of speech are involved. When the appellant exhibited himself to the different women[1] walking by his house, he was standing by the front screen door to his house. He argues that since he was in his house he was entitled to publicly expose himself to people on the sidewalk. The right of privacy has no application to these facts. As to the freedom of speech being involved, appellant evidently thinks that public indecency is a protected First Amendment Right. He cites no cases for this proposition. The appellee can't locate any either.

For the foregoing reasons the appellees request that this appeal be dismissed as the facts of this case do not present an exception to the finality rule.

II.

PUBLIC INDECENCY IS NOT AN ACTIVITY THAT IS PROTECTED UNDER THE FIRST AMENDMENT NOR UNDER THE RIGHT OF PRIVACY.

The appellant prefaces his argument by stating that the Illinois Public Indecency Statute is vague and standardless. Thus he argues that he did not understand that standing by his

---

[1] The appellant suggests that he has a right to separate trials for the various times he exposed himself to the public with intent to arouse himself. While this may be true, *see, Ill. Rev. Stat.*, ch. 38, § 114-8, such a course of action is voluntary on his part. It is pure conjecture for the appellant to argue that the State of Illinois will subject him to multiple trials.

front door with his sexual organ exposed while attempting to arouse himself, constituted a "lewd" exposure, as that term is used by the statute.[2] In this regard this Court has stated:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.
>
> On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. * * *

United States v. *Hariss,* 347 U. S. 612 (1954).

As the Illinois Supreme Court pointed out,

> . . . The information charged the defendant with exposing his sex organ, conduct which clearly constitutes a lewd exposure, and he may not pose hypothetical situations in which the statutory standards might conceivably be unconstitutionally vague. . . . Appellant's Appendix at A-11.

These facts do not present a substantial question.

Appellant, in his jurisdictional statement, then goes on to talk about some *obscenity* statutes that have been held unconstitutional. Illinois has both an obscenity statute[3] and a public indecency statute. The Illinois Supreme Court, in its opinion, stated that the public indecency statute "is aimed at public displays which do not involve first amendment rights. Such displays may be prohibited without reference to the constitutional obscenity standard, because they do not involve primarily expressive activities." Appellant's Appendix at A-7. The appellant simply does not raise any substantial question by this line of reasoning as detailed obscenity standards have nothing to do with public indecency.

---

[2] Appellant feels that a public indecency statute must contain obscenity guidelines as enunciated by this Court in *Miller* v. *California,* 413 U. S. 15 (1973). Once, again, appellee reiterates that freedom of speech does not encompass public indecency.

[3] This Court upheld the constitutionality of this statute in *Ward* v. *Illinois,* 431 U. S. 767 (1977).

Appellant also argues that since he was standing by his front door when he committed the public indecency, he is protected by the right to privacy. Boiled down to its essentials appellant maintains that his home is his castle and therefore he can do anything he pleases as long as he is within the confines of that castle. Appellant misses the point. He knowingly made his actions visible to the passersby on the sidewalk. This claim does not present a substantial question as his activities are by definition, public, not private.

Appellant further requests that this Court examine the spelling error located in *Ill. Rev. Stat.*, ch. 38, § 11-9(b). At the time appellant exposed himself the Illinois statute defined the term "public place" as "any place where the conduct may reasonably be *excepted* to be viewed by others." *Ill. Rev. Stat.*, ch. 38, § 11-9(b) (1977). Obviously the word "excepted" should have been "expected," but a typing error occurred during the enrolling and engrossing process and passed unnoticed. The Illinois Supreme Court in its opinion found that the Illinois legislature clearly intended to use the word "expected." The original bill containing this section used the word "expected." The committee comments illustrate that this was the intendment. *Ill. Ann. Stat.*, ch. 38, § 11-9, Committee Comments, at 304 (Smith-Hurd 1979). Both of the statutory computations footnote the word "excepted" in the statute and indicate it should probably read "expected." *Ill. Rev. Stat.*, ch. 38, § 9-11(b) (1977); *Ill. Ann. Stat.*, ch. 38, § 11-9(b) (Smith-Hurd 1979). It cannot be said that men of ordinary intelligence would have had to guess at the meaning of public place. For this reason, this typing error does not raise a substantial question.

Lastly the appellant seeks review because the statute does not require the actor to intend that his actions be viewed by others. Appellant overlooks the intent requirement clearly enunciated by the statute. If the actor lewdly exposes himself "with intent to arouse" himself in a public place he commits

public indecency. The State clearly has the power to define the situs or victim[4] of a crime. In this case the crime can only be committed in a public place. (That is why there is no privacy argument here).

No constitutional question is presented by the State defining the place where a crime may be committed. This Court should dismiss the appeal.

---

[4] For example Illinois has a misdemeanor statute making it a crime to indecently solicit a child under 13 years of age. *Ill. Rev. Stat.*, ch. 38, § 11-6 (1973). The State does not have to prove that the perpetrator intended his victim to be under 13.

CONCLUSION

Wherefore, appellee respectfully submits that this Court does not have jurisdiction over this case as the "finality" requirement of 28 U. S. C. 1257(2) is not met. In addition this cause presents unsubstantial questions. The appeal should alternatively be dismissed for that reason.

Respectfully submitted,

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On Appeal from the Supreme Court of Illinois

REPLY BRIEF OPPOSITION MOTION TO DISMISS

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I.

JURISDICTION

On the question of jurisdiction, appellee fails to take into account:

(1) Appellant is charged in two separate cases, which would, in the proper defense of appellant, require three separate trials. A consolidation would adversely affect the prospect of a successful defense.

(2) Appellant should not be tried even on one charge based upon an unconstitutional statute.

Neither factor was present in the cases upon which appellee relies.

In *Parr* v. *United States* (1956), 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377 relied on by appellee, the Order appealed from permitted the government to dismiss a criminal case in one district over appellant's objection, after the government had reindicted appellant in another district.

This Court held that even assuming the Order's finality, the accused was not aggrieved by such dismissal and could not appeal.

There was no issue of the criminal statute's constitutionality involved.

Moreover, *Parr* held at page 100 L.Ed. 1384:

> "...The Order dismissing the Corpus Christi indictment was but an interlocutory step in this prosecution, and its review must await the conclusion of the 'whole matter litigated' between the Government and the petitioner—namely, 'the right to convict the accused of the crime charged in the indictment.' *Heike* v. *United States, supra* (217 US at p 429)."

Such holding does not fit the instant case. There is no right of the State of Illinois to "convict the accused of the crime charged in the indictment." No one should even be tried, once, twice or three times, let alone convicted, under an unconstitutional criminal statute.

The same may be said in regard to the other cases relied on by appellee, namely, *Chapman* v. *California* (1972), 405 U.S. 1020, 92 S.Ct. 1284, 31 L.Ed.2d 483, *Arceneaux* v. *Louisiana* (1964), 376 U.S. 336, 84 S.Ct. 777, 11 L.Ed.2d 750, and *Eastman* v. *Ohio* (1936), 299 U.S. 505, 81 L.Ed. 374. In *Chapman,* decided in 1972, the dissent of Mr. Justice Douglas, joined by Mr. Justice Brennan and Mr. Justice Marshall, contains significant

references to cases relied on in the instant case, namely, *Mills* v. *Alabama* (1966), 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434, and *Mercantile National Bank* v. *Langdeau* (1963), 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520. In the dissent of Mr. Justice Brennan appears the pertinent statement particularly applicable to the instant case:

> "The purpose of furthering economy in judicial administration would plainly be served by deciding these questions now rather than by sending petitioner through the formalities of a trial and months—if not years—of repetitious appellate review before allowing him to present to this Court again the very issues that are here now."

Appellee acknowledges that *Cox* allowed an appeal, even though there were further proceedings to be heard in the State Courts (page 3), and that "the finality requirement is not rigid." (page 4). Appellee ignores the fact that the Illinois Public Indecency Act can involve First Amendment Rights. Appellee ignores the holding in *Langdeau* wherein this Court took jurisdiction to hear that appeal which involved review of a venue question. Appellee makes no answer to the position of appellant that determination of whether there even need be a trial is at least as persuasive on the issue of jurisdiction as is the question of the place of trial involved in *Langdeau*.

Appellee cites no logical reason for withholding jurisdiction at this stage of the proceeding, whereas all logic supports appellant that now is the time to protect a person from multiple trials under an unconstitutional statute on an allegation that is devastating to the reputation of the accused and yet an accusation which involves no victim at all.

II.

THE STATUTE

Appellee relies on the case of *United States* v. *Harriss* (1954), 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, in opposition to appellant's position that the Illinois Public Indecency Statute violates the Due Process Doctrine of vagueness with reference to the statutory language "lewd exposure of the body".

Harriss is not in point as a reading of the case clearly reflects. The Federal Lobbying Act was there involved. Under the construction given it by this Court, the disclosure provisions were held not unconstitutionally vague.

It is apparent appellee has no ground to distinguish *Smith* v. *Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605, 609, and *Attwood* v. *Purcell* (1975 D.C.Ariz.), 402 F.Supp. 231, which cases cited by appellant are clearly in point. For obvious reasons, appellee makes no attempt to distinguish them but ignores them and cites only *Harriss,* which is totally inapplicable. The Court's pronouncement in *Harriss* is a far cry from the question of whether "lewd exposure" is unconstitutionally vague and standardless. As stated in the dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurs, the test of *Connally* v. *General Construction Company* (1926), 269 U.S. 385, 70 L.Ed. 322, 328, 46 S.Ct. 126, is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

It is no answer for appellee to limit consideration on the vagueness question to the understanding of an accused charged under a criminal statute. It is equally essential to a proper determination that the statute not involve such a "standardless sweep" that juries and prosecutors may pursue their own predilections in determining what particular exposure of what part of the body is proscribed by the Legislature as a "lewd ex-

posure". It is the lack of standards defining "lewd" exposure of the body that resulted in the Court's striking down the statute in *Attwood,* and it was the lack of standards defining "contemptuous treatment" of the flag that resulted in this Court striking down the Massachusetts flag misuse statute in *Smith* v. *Goguen.*

Appellee has shown no legitimate reason why the same lack of standards defining lewd exposure of the body should not result in striking down the Illinois Public Indecency Statute.

Appellee misapprehends appellant's position on scienter. There is nothing in the statutory provision "with intent to arouse" himself that constitutes the necessary statutory intent that another person see the actor at the time of exposing some part of the body. Exposure of the body simply means to uncover the body. Search the statute for a requirement that the actor *intend* another viewer to see the act—it is not there. Nor is there any statutory requirement that the actor *intend* to affect the viewer in any manner.

Appellee also misapprehends defendant's position regarding a comparison of the Illinois Obscenity Statute and the Illinois Public Indecency Statute.

Appellant's position is basic: Inasmuch as *Miller* type standards define the word "obscene" in the Illinois Obscenity Statute, which criminalizes the performance of "an obscene exhibition of his body for gain", the appellant, when prosecuted for an alleged violation of the standardless Illinois Public Indecency Statute, is denied equal protection under the Fourteenth Amendment in that he is not accorded protection by standards defining the word "lewd", whereas a person prosecuted under the Illinois Obscenity Statute for performing the same act on a public stage would be accorded standards defining the word "obscene". There is no rational reason to accord the former less protection than the latter. There is no legitimate state interest promoted by such an arbitrary classification based on nothing but semantics, namely: the legislative choice of the

words "lewd exposure of the body" in the Public Indecency Statute, and "obscene exhibition of his body" as used in the Illinois Obscenity Statute.

Appellee seeks to rely on the charge itself in considering the statute's unconstitutionality. Nothing stated in the Information filed against appellant can cure the statutory deficiency. The dissent in *Harriss* relied on by appellee, addresses this question as follows at 98 L.Ed. 1002:

> "...As stated in *Lanzetta* v. *New Jersey*, 306 US 451, 453, 83 L ed 888, 890, 59 S Ct. 618P
>
> > 'If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . .' "

Appellee also ignores appellant's position on the overbreadth doctrine. The Illinois Public Indecency Statute *can* implicate First Amendment rights of others. There is nothing within it which would prevent prosecution of a performer on a public stage under its terms, whether or not the performance was done for gain. Consequently, even though appellant is not on the public stage, he has standing to and does challenge the validity of the statute since the existence of the statute may inhibit expressive rights of others protected by the First Amendment, even though the defendant in his private home was not charged as a performer on the public stage.

Appellee does not address appellant's position on the ex post facto judicial enlargement of the statute by the Illinois Supreme Court's interpretation that a private home comes within the meaning of the Public Indecency Statute. Nor does appellee explain away the obvious error of the Illinois Supreme Court in applying the civil rather than the criminal statutory construction

rule. A properly applied strict construction should not broaden this statute to include "private home" within the definition "public place". The issue is not what appellee thinks the legislature intended. As stated by Chief Justice Marshall, it "is the legislature, not the court, which is to define a crime." *United States* v. *Wiltberger,* 18 U.S. 5. Wheat 76, 95, 5 L.Ed. 37, 42.

Judicial enlargement of the statute to correct what the Court believes to be a legislative error is prohibited by the ex post facto clause to the same extent as would be an amendatory statute passed by the Legislature to correct its own error. Thus, the judicial enlargement in this case should not be upheld to the prejudice of appellant.

Appellee also misapprehends the question of privacy. A person in his own home has the right to protection from prosecution for an act of "sexual intercourse" or "lewd exposure" when seen, *through no intent of the house owner,* by a passerby or peeping tom. Nothing in the statute requires proof of intent by the actor that he be seen by another person. Therefore, every house owner is in jeopardy under the terms of this statute. Here again, the overbreadth doctrine should apply, and appellant has standing to raise the question, not only of the statutory breach of his own constitutionally protected right of privacy, but also the statutory breach of the privacy rights of others and the inhibiting effect of the statute on the exercise of privacy rights in the home. Again, appellee confuses the issue (Motion page 4). It is not the wording of the charge, it is the wording of the statute that is involved.

Appellee's Motion to Dismiss the Appeal should be denied.

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